

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

74-1903

United States Court of Appeals

FOR THE SECOND CIRCUIT

WILLIAM A. BARRETT, M.D.,

Plaintiff-Appellant,

—against—

UNITED HOSPITAL; RICHARD A. STOLNACKE, Executive Director of United Hospital, individually and in his official capacity; ALFRED D. GRANT, M.D.; JAMES A. SUDBAY, M.D.; EUGENE WASSERMAN, M.D.; J. DOUGLAS HALLOCK, M.D.; H. CLAY JOHNSON; WILLIAM H. JENNINGS; CHARLES R. C. STEERS; WILLIAM REES; JACK GANTZ; RICHARD D. LOMBARD; DAVID GILE; RICHARD W. DAMMON; MRS. THOMAS H. LANE; EDWIN H. KAUFMAN, M.D.; CHARLES J. ALEXANDER, M.D.; ANTHONY BALCHUNAS, M.D.; H. EUGENE SEANOR, M.D.; DAVID A. WILSON, M.D.; JOHN H. DALE, JR., M.D.; LEO T. DELANEY, M.D.; MRS. EDNA DELZIO, R.N.; WILLIAM C. FELCH, M.D.; ABRAHAM L. HALPERN, M.D.; MRS. HARVEY KELSEY; LAWRENCE MARX, JR.; MRS. EMIL MOSBACHER, JR.; MARTIN NESCHI, M.D.; JOEL SCHWARTZMAN, M.D.; JOSEPH SILBERSTEIN, M.D.; DAVID A. W. WILSON, M.D.; C. JONATHAN SHATTUCK; SAMUEL DRAGO, M.D.; VIRGINIA HAGGERTY, M.D.; PHILIP JENSEN, M.D.; SHELBY LEVER, M.D.; HAROLD ROTH, M.D.; JACOB SHRAGOWITZ, M.D.; and RONALD DEE, M.D.,

Defendants-Appellees.

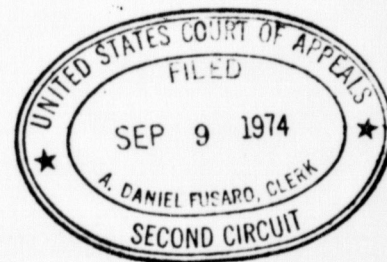
ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX FOR APPELLANT

HAYT, HAYT, TOLMACH
& LANDAU
Attorneys for Defendants-Appellees,
United Hospital, Stolnacke, Johnson,
Jennings, Steers, Rees, Gantz,
Lombard, Gile, Dammon, Lane,
Kelsey, Marx, Mosbacher, Shattuck,
Hallock, and Dale
55 Northern Boulevard
Great Neck, New York 11021
(516) 466-5800

JEREMIAH S. GUTMAN
LEVY, GUTMAN, GOLDBERG
& KAPLAN
Attorneys for Plaintiff-Appellant
363 Seventh Avenue
New York, New York 10001
(212) 736-2226

CLARK, GAGLIARDI & MILLER, Esqs.
Attorneys for Defendants-Appellees, Grant,
Sudbay, Wasserman, Kaufman, Alexander,
Balchunas, Seanor, Delaney, Felch,
Halpern, Neschis, Schwartzman, Silberstein,
Wilson, Drago, Haggerty, Jensen, Lever,
Roth, Shragowitz and Dee
175 Main Street
White Plains, New York 10601
(914) 946-8900



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PAGINATION AS IN ORIGINAL COPY

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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WILLIAM A. BARRETT, M.D.,

Plaintiff,

-against-

UNITED HOSPITAL, et al.,

Defendants.

: UNITED STATES DISTRICT
COURT FOR THE SOUTHERN
: DISTRICT OF NEW YORK

: Case No. 73 Civ 1716

: Judge Bauman

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

WILLIAM A. BARRETT, M.D.,

Plaintiff,

-against-

UNITED HOSPITAL; RICHARD A. STOLNACKE,
Executive Director of United Hospital,
individually and in his official capacity;
ALFRED D. GRANT, M.D.; JAMES A. SUDBAY,
M.D.; EUGENE WASSERMAN, M.D.; J. DOUGLAS
HALLOCK, M.D.; H. CLAY JOHNSON; WILLIAM H.
JENNINGS; CHARLES R. C. STEERS; WILLIAM
REES; JACK GANTZ; RICHARD D. LOMBARD;
DAVID GILE; RICHARD W. DAMMON; MRS. THOMAS
H. LANE; EDWIN H. KAUFMAN, M.D.; CHARLES
J. ALEXANDER, M.D.; ANTHONY BALCHUNAS, M.D.;
H. EUGENE SEANOR, M.D.; DAVID A. WILSON,
M.D.; JOHN H. DALE, JR., M.D.; LEO T.
DELANEY, M.D.; MRS. EDNA DELZIO, R.N.;
WILLIAM C. FELCH, M.D.; ABRAHAM L. HALPERN,
M.D.; MRS. HARVEY KELSEY; LAWRENCE MARX, JR.;
MRS. EMIL MOSBACHER, JR.; MARTIN NESCHI,
M.D.; JOEL J. SCHWARTZMAN, M.D.; JOSEPH
SILBERSTEIN, M.D.; DAVID A. W. WILSON, M.D.;
C. JONATHAN SHATTUCK; SAMUEL DRAGO, M.D.;
VIRGINIA HAGGERTY, M.D.; PHILIP JENSEN,
M.D.; SHELBY LEVER, M.D.; HAROLD ROTH, M.D.;
JACOB SHRAGOWITZ, M.D.; and RONALD DEE,
M.D.,

Defendants.

SUMMONS

TO THE ABOVE-NAMED DEFENDANTS:

You are hereby summoned and required to serve upon
LEVY, GUTMAN, GOLDBERG, AND KAPLAN, Plaintiff's attorneys,
whose address is 363 Seventh Avenue, New York, New York 10001.

an answer to the complaint which is herewith served upon you, within twenty (20) days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

Dated: April 17, 1973

JOHN LIVINGSTON
Clerk of Court

Deputy Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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WILLIAM A. BARRETT, M.D., :

Plaintiff, :

-against- :

UNITED HOSPITAL; RICHARD A. STOLWACKE, :
Executive Director of United Hospital, :
individually and in his official :
capacity; ALFRED D. GRANT, M.D.; :
JAMES A. SUDDAY, M.D.; EUGENE WASSERMAN, :
M.D.; J. DOUGLAS HALLOCK, M.D., H. :
CLAY JOHNSON; WILLIAM H. JENNINGS; :
CHARLES R. C. STEERS; WILLIAM REES; :
JACK GANTZ; RICHARD D. LOMBARD; DAVID :
GILE; RICHARD W. DAMMON; MRS. THOMAS :
H. LANE; EDWIN H. KAUFMAN, M.D.; :
CHARLES J. ALEXANDER, M.D.; ANTHONY :
BALCHUNAS, M.D.; H. EUGENE SEANOR, :
M.D.; DAVID A. WILSON, M.D.; JOHN H. :
DALE, JR., M.D.; LEO T. DELANEY, M.D.; :
MRS. EDNA DELZIO, R.N.; WILLIAM C. :
FELCH, M.D.; ABRAHAM L. HALPERN, M.D.; :
MRS. HARVEY KELSEY; LAWRENCE MARX, JR.; :
MRS. EMIL ROSEACHER, JR.; MARTIN :
NESCHI, M.D.; JOEL J. SCHWARTZMAN, :
M.D.; JOSEPH SILBERSTEIN, M.D.; DAVID :
A. W. WILSON, M.D.; C. JONATHAN :
SHATTUCK; SAMUEL DRAGO, M.D., VIRGINIA :
HAGGERTY, M.D., PHILIP JENSEN, M.D.; :
SHELEY LEVER, M.D.; HAROLD ROTH, M.D.; :
JACOB SHRAGOWITZ, M.D. and RONALD DEE, :
M.D., :

Defendants. :

COMPLAINT
FOR INJUNCT-
IVE, DECLARA-
TORY, MANDA-
MUS RELIEF
AND FOR
MONETARY
DAMAGES

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Plaintiff, by his undersigned attorneys,
respectfully shows to the Court and alleges as follows:

JURISDICTION

FIRST: The jurisdiction of this Court is
invoked pursuant to Title 28 USC §§ 1331, 1343(1), (2) and

(4) and 1361 and pursuant to the First, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution. This action is authorized by Title 42 USC §§ 1983, 1985, and 1986. Venue is founded upon 28 USC § 1391 (b).

This is an action for a declaratory judgment, for preliminary and permanent injunctive relief, for an order or writ in the nature of mandamus, and for monetary damages. Plaintiff requires and seeks a declaration that the continued course of action of the Defendants in preventing Plaintiff from practising medicine pursuant to law and from enjoying full privileges as a physician and surgeon at Defendant UNITED HOSPITAL is unlawful and in violation of the rights of Plaintiff and his patients under the First, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution.

Plaintiff requires and seeks a preliminary and permanent injunction enjoining and restraining Defendants, their agents, servants, employees, successors in office, and all others acting in concert and participation with them, from refusing or continuing to refuse to grant to Plaintiff full privileges as a physician and surgeon at Defendant UNITED HOSPITAL.

Plaintiff requires and seeks a preliminary and permanent injunction enjoining and restraining Defendants, their agents, servants, employees and successors in office, and all others acting in concert and participation

with them, from preventing Plaintiff from being granted privileges at other hospitals.

Plaintiff requires and seeks an order or writ in the nature of mandamus requiring the Defendants, their agents, servants, employees, successors in office, and all others acting in concert and participation with them, to grant to Plaintiff the immediate and complete restoration of all privileges of a full staff member at Defendant UNITED HOSPITAL.

Plaintiff requires and seeks judgment against the Defendants in the amount of FIVE HUNDRED THOUSAND (\$500,000) DOLLARS for compensatory damages heretofore incurred by him as a result of Defendants' wrongful actions and Plaintiff further is entitled to appropriate punitive damages.

PARTIES

SECOND: Plaintiff is an adult citizen and resident of the State of New York and the United States of America, and resides at One Prince Willow Lane, Mamaroneck, New York, within the jurisdiction of this Court. Plaintiff is engaged in the practice of medicine at 310 Claflin Avenue, Mamaroneck, New York. Plaintiff is a physician, duly licensed to practice that profession under the laws of the States of New York and Connecticut. He is a member in good standing of the Westchester County Medical Society and the New York State Medical Society.

Plaintiff is also a Fellow of the American College of Surgeons and is a member of other highly regarded professional societies. Plaintiff has for some time past and is presently serving as Police Surgeon for the Mamaroneck Police Department and as Fire Surgeon for the Mamaroneck Fire Department. He has given of himself unstintingly in the highest traditions of the medical profession in order to provide medical services both to those able to pay and to those unable to pay.

THIRD: Defendant UNITED HOSPITAL (hereinafter referred to as "HOSPITAL") is a community hospital located at 406 Boston Post Road, Port Chester, New York within the jurisdiction of this Court. HOSPITAL, on behalf of the State of New York, serves the needs of persons residing in a certain area including the municipalities of Harrison, Mamaroneck, Port Chester, Purchase and Rye. Upon information and belief, HOSPITAL is and at all times herein has been funded, regulated, and controlled fully or in part by the State of New York and the United States of America with respect to matters including, but not limited to, the construction and acquisition of facilities and equipment, licensing, inspection, payments for supplies and services to patients, medicines, Medicare and Medicaid, granting of tax benefits, and the setting of standards governing the conduct of the activities of and in UNITED HOSPITAL, including the promulgation of rules and regulations of the HOSPITAL. HOSPITAL has

had delegated to it by the State of New York certain official functions, including, but not limited to, the power to grant or withhold professional privileges to physicians and surgeons.

FOURTH: Defendant RICHARD A. STOLNACKE is and at all relevant times was the Executive Director of HOSPITAL and, upon information and belief, is and was, at all relevant times, a member of the Joint Conference Committee of HOSPITAL.

FIFTH: Defendant ALFRED D. GRANT, M.D. is and at all relevant times was Chairman of the Credentials Committee of HOSPITAL.

SIXTH: Defendant JAMES A. SUDBAY, M.D. is and at all relevant times was Chief of Staff of HOSPITAL and a member of the Joint Conference Committee of HOSPITAL.

SEVENTH: Defendant EUGENE WASSERMAN, M.D. is and at all relevant times was a pediatrician at HOSPITAL.

EIGHTH: Defendant J. DOUGLAS HALLOCK, M.D. is and at all relevant times was a surgeon at HOSPITAL.

NINTH: Defendant H. CLAY JOHNSON is and at all relevant times was President of the Board of Trustees and a member of the Joint Conference Committee of HOSPITAL.

TENTH: Defendant WILLIAM H. JENNINGS is and at all relevant times was Chairman of the Board of Trustees of HOSPITAL.

ELEVENTH: Defendant CHARLES R. C. STEERS is and at all relevant times was the Chairman of the Executive Committee of the Board of Trustees and a member of the Joint Conference Committee of HOSPITAL.

TWELFTH: Defendant WILLIAM REES is and at all relevant times was Chairman of the Finance Committee of the Board of Trustees of HOSPITAL.

THIRTEENTH: Defendant JACK GANTZ is and at all relevant times was Vice President of the Board of Trustees of HOSPITAL.

FOURTEENTH: Defendant RICHARD D. LOMBARD is and at all relevant times was Vice President of the Board of Trustees of HOSPITAL.

FIFTEENTH: Defendant DAVID GILE is and at all relevant times was Treasurer of the Board of Trustees of HOSPITAL.

SIXTEENTH: Defendant RICHARD DAMMONN is and at all relevant times was Secretary of the Board of Trustees and Chairman of the Joint Conference Committee of HOSPITAL.

SEVENTEENTH: Defendant MRS. THOMAS H. LANE is and at all relevant times was a member of the Medical Council and a member of the Joint Conference Committee of HOSPITAL.

EIGHTEENTH: Defendant EDWIN H. KAUFMAN, M.D. is and at all relevant times was a member of the Medical Council and a member of the Joint Conference Committee of HOSPITAL.

NINETEENTH: Defendant CHARLES J. ALEXANDER, M.D. is and at all relevant times was the Chairman of the Medical Council and a member of the Joint Conference Committee of HOSPITAL.

TWENTIETH: Defendant ANTHONY BALCHUNAS, M.D. is and at all relevant times was a member of the Medical Council and of the Joint Conference Committee of HOSPITAL.

TWENTY-FIRST: Defendant H. EUGENE SEANOR, M.D. is and at all relevant times was a member of the Medical Council and a member of the Joint Conference Committee of HOSPITAL.

TWENTY-SECOND: Defendant DAVID A. WILSON, M.D. is and at all relevant times was a member of the Joint Conference Committee and Director of Surgery of HOSPITAL.

TWENTY-THIRD: Defendant JOHN H. DALE, JR., M.D. is and at all relevant times was a member of the Medical Council of HOSPITAL.

TWENTY-FOURTH: Defendant LEO T. DELANEY, M.D. is and at all relevant times was a member of the Medical Council of HOSPITAL.

TWENTY-FIFTH: Defendant MRS. EDNA DELZIO, R.N. is and at all relevant times was a member of the Medical Council of HOSPITAL.

TWENTY-SIXTH: Defendant WILLIAM C. FELCH, M.D. is and at all relevant times was a member of the Medical Council of HOSPITAL.

TWENTY-SEVENTH: Defendant ABRAHAM L. HALPERN, M.D. is and at all relevant times was a member of the Medical Council of HOSPITAL.

TWENTY-EIGHTH: Defendant MRS. HARVEY KELSEY is and at all relevant times was a member of the Medical Council of HOSPITAL.

TWENTY-NINTH: Defendant LAWRENCE MARX, JR. is and at all relevant times was a member of the Medical Council of HOSPITAL.

THIRTIETH: Defendant MRS. EMIL MOSEACHER, JR. is and at all relevant times was a member of the Medical Council of HOSPITAL.

THIRTY-FIRST: Defendant MARTIN NESCHI, M.D., is and at all relevant times was a member of the Medical Council of HOSPITAL.

THIRTY-SECOND: Defendant JOEL J. SCHWARTZMAN, M.D. is and at all relevant times was a member of the Medical Council of HOSPITAL.

THIRTY-THIRD: Defendant JOSEPH SILBERSTEIN, M.D. is and at all relevant times was a member of the Medical Council of HOSPITAL.

THIRTY-FOURTH: Defendant C. JONATHAN SHATTUCK is and at all relevant times was a member of the Medical Council of HOSPITAL.

THIRTY-FIFTH: The following Defendants are and at all relevant times were members of HOSPITAL's Credentials Committee:

SAMUEL DRAGO, M.D.
VIRGINIA HAGGERTY, M.D.
PHILIP JENSEN, M.D.
SHELBY LEVER, M.D.
HAROLD ROTH, M.D.
JACOB SHIRAGOWITZ, M.D.

THIRTY-SIXTH: Defendant RONALD DEE is and at all relevant times was a staff physician and surgeon at Defendant HOSPITAL.

THIRTY-SEVENTH: Defendants are sued individually and in their official capacities herein set forth.

ALLEGATIONS OF FACT

THIRTY-EIGHTH: In or about June 1940, Plaintiff was graduated from the Medical College of Syracuse University.

THIRTY-NINTH: From on or about July 1, 1940, through and including on or about July 1, 1941, Plaintiff held a rotating internship at HOSPITAL.

FORTIETH: From on or about July 1, 1941, through in or about March 1942, Plaintiff held a rotating surgical residency at HOSPITAL.

FORTY-FIRST: In or about April 1942, following examination, Plaintiff was duly licensed to practice medicine in the State of New York, being granted license number 039948.

FORTY-SECOND: From on or about March 26, 1942, through and including January 5, 1946, Plaintiff served honorably as a medical officer and physician in the Army of the United States.

FORTY-THIRD: In or about July 1942, Plaintiff was duly appointed to the regular surgical staff of HOSPITAL.

FORTY-FOURTH: Upon completion of military service, Plaintiff opened an office for the practice of medicine in Mamaroneck, New York.

FORTY-FIFTH: During the approximately twenty years from 1946 through September 29, 1966, Plaintiff was an active member in good standing of the attending surgical staff of HOSPITAL (except for the years 1954 to 1956, during which time Plaintiff was granted a leave of absence from that position).

FORTY-SIXTH: From 1946 through and including 1969, plaintiff was Police Surgeon for the Town of Mamaroneck Police Department and Fire Surgeon for the Town of Mamaroneck Fire Department. In 1971 he resumed those posts.

FORTY-SEVENTH: In or about April 1962, Plaintiff was licensed to practice medicine within the State of Connecticut, and received license number 10907.

FORTY-EIGHTH: From approximately July 1954, through July 1956, Plaintiff held a surgical residency at Brooklyn Veterans Hospital.

FORTY-NINTH: On or about September 28, 1966, Plaintiff was arrested and charged with criminal abortion, pursuant to the then Sections 125.40 et seq. of the Penal Law of New York State.

FIFTIETH: On or about August 29, 1968, Plaintiff pleaded guilty to the crime of assault in the third degree, under the then Section 120.00 of the Penal Law of New York State, in full satisfaction of all charges then pending against him but no punishment was imposed.

FIFTY-FIRST: On or about September 12, 1968, Plaintiff was granted a Certificate of Relief from Forfeiture and Disability.

FIFTY-SECOND: On or about September 16, 1968, the Board of Trustees of HOSPITAL determined that Plaintiff should not be reappointed to his position as attending surgeon at HOSPITAL. This decision was noted by the Board of Trustees to be "without prejudice."

FIFTY-THIRD: On or about April 14, 1969, Plaintiff's license to practice medicine within the State of New York was revoked by the Commissioner of Education on account of the abortion charges.

FIFTY-THIRD: On or about February 4, 1971, the Commissioner of Education of the State of New York entered an order providing that the Order of Revocation of Plaintiff's license to practice medicine within the State of New York be permanently stayed, effective July 1, 1971.

FIFTY-FOURTH: On or about February 10, 1971, Plaintiff applied in writing to the Executive Director of HOSPITAL for extension or restoration of surgical and professional privileges. A copy thereof is annexed hereto, incorporated herein as Exhibit A.

FIFTY-FIFTH: On or about February 24, 1971, Plaintiff was interviewed in connection with his application for surgical privileges by Defendant DAVID A. WILSON, M.D.

FIFTY-SIXTH: On or about March 16, 1971, Plaintiff mailed to HOSPITAL his duly completed application for the extension of such surgical privileges. A copy thereof is annexed hereto and incorporated herein as Exhibit B.

FIFTY-SEVENTH: On or about May 28, 1971, Plaintiff inquired of Defendant RICHARD A. STOLNACKE as to the status of Plaintiff's application for the extension of surgical privileges but received no response.

FIFTY-EIGHTH: On or about June 28, 1971, Plaintiff was for the first time advised of purported

additional requirements for the filing of a completed application for such privileges, such "additional requirements" having been devised and created by Defendants as a device to delay processing of Plaintiff's application and to prevent favorable action thereon.

FIFTY-NINTH: Plaintiff duly completed the said additional purported requirements and timely filed with Defendant HOSPITAL. A copy thereof is annexed hereto and incorporated herein as Exhibit C.

SIXTIETH: On or about November 5, 1971, Plaintiff inquired of defendant ALFRED D. GRANT, M.D. as to the cause of the delay in processing his application but received no explanation.

SIXTY-FIRST: On or about February 16, 1973, Defendants comprising the Joint Conference Committee of HOSPITAL, acting in concert with all the Defendants, held a meeting pretending to afford Plaintiff due process of law, at which Plaintiff's application for the extension of surgical privileges was purportedly considered.

SIXTY-SECOND: Plaintiff attended that meeting and was represented by counsel. A transcript of that proceeding is annexed hereto and incorporated herein as Exhibit D.

SIXTY-THIRD: Defendants comprising the Joint Conference Committee never had any intention of granting

Plaintiff's application and held such meeting as a sham and pretense and as part of the scheme created and implemented by each and all of the Defendants to prevent Plaintiff from being granted privileges at Defendant UNITED HOSPITAL or any other hospitals.

SIXTY-FOURTH: On or about May 3, 1972, the individual Defendants, acting in their respective capacities as officials of Defendant UNITED HOSPITAL, caused Defendant Hospital to deny Plaintiff's application for the extension of surgical privileges. Such denial was without basis in law or fact, was beyond Defendants' delegated authority, was arbitrary, capricious, vindictive and an abuse of discretion.

SIXTY-FIFTH: Plaintiff thereafter duly filed a formal complaint with the State of New York Department of Health pursuant to § 2801-b of the Public Health Law of the State of New York.

SIXTY-SIXTH: On or about August 16, 1972, Plaintiff was advised by the State of New York Department of Health that Public Health Law §2801-b was inapplicable to his case and that no authority to investigate his case existed. A copy of the Department of Health's letter is annexed hereto as Exhibit E.

SIXTY-SEVENTH: Plaintiff at all times lawfully continued the practice of medicine in the State of Connecticut.

SIXTY-EIGHTH: Following the restoration of Plaintiff's New York license, Plaintiff tried to secure privileges at other hospitals within reasonable distance of Plaintiff's Office and practice but was and remains excluded by all of them, solely as a result of the plan and scheme created by the Defendants and implemented and effected on their behalf by the unlawful acts hereinafter described of Defendants in preventing Plaintiff from being restored privileges at Defendant Hospital and the unlawful acts of Defendants GRANT, SUDBAY, WASSERMAN, WILSON and DEE.

SIXTY-NINTH: Upon information and belief, from in or about 1966 through and including the present, Defendants ALFRED D. GRANT, M.D., JAMES A. SUDBAY, M.D., EUGENE WASSERMAN, M.D., DAVID A. WILSON, M.D. and RONALD DEE, M.D. have maliciously and illegally conspired and acted together with the other Defendants and with others unknown to Plaintiff, in order to cause Defendant HOSPITAL and all other nearby hospitals to refuse to accept Plaintiff's application for the extension of surgical privileges, and have otherwise conspired and acted together to cause Defendant HOSPITAL and other hospitals to deny Plaintiff the benefits of such privileges and in order to destroy Plaintiff's reputation and professional practice.

SEVENTIETH: On information and belief, the Defendants named in Paragraph SIXTY-NINTH, acting on behalf of themselves and the other Defendants and acting individually on behalf of and by authority of defendant UNITED

HOSPITAL, have communicated to administrators and professional staff at other hospitals, and to others, false and malicious statements concerning Plaintiff personally and professionally and have used influence and pressure to cause patients, hospitals and other colleagues to shun and exclude Plaintiff. The purpose and effect of such malicious and unlawful conspiracy and actions have been to stifle Plaintiff's professional practice and reputation and his ability to render complete and adequate professional care to his patients and freely to associate professionally with them.

SEVENTY-FIRST: The purpose and effect of such denial to Plaintiff of surgical privileges at HOSPITAL and other hospitals are wrongful invasions and restrictions of Plaintiff's rights under the First, Fifth, Eighth, Ninth, and Fourteenth Amendments to the United States Constitution, in that Plaintiff is thereby prevented from associating freely and privately with his patients and is thus denied due process of law and the equal protection of the laws and is subjected to cruel and unusual punishment.

SEVENTY-SECOND: Defendants, acting under color of State law as more fully described above, have unlawfully denied to Plaintiff surgical privileges at HOSPITAL and at other hospitals.

SEVENTY-THIRD: Defendants, acting under color of State law as more fully described above, have thus unlawfully caused Plaintiff to be deprived of rights, privileges, and immunities secured by the Constitution of the United States, as more fully set forth above.

SEVENTH-FOURTH: Defendants' Executive Director STOLMACKE, CREDENTIALS COMMITTEE defendants, JOINT CONFERENCE COMMITTEE Defendants, BOARD OF TRUSTEES Defendants, EXECUTIVE COMMITTEE Defendants, MEDICAL COUNCIL Defendants and Defendants who are staff physicians at Defendant HOSPITAL had at all relevant times and have knowledge of the wrongs herein alleged as planned and done to Plaintiff and had power to prevent the infliction thereof by use of their respective positions. Each and all of such Defendants failed and refused to act to aid Plaintiff or prevent such wrongs and still continue to do so and to participate in the continuing infliction of such damages upon Plaintiff.

SEVENTY-FIFTH: As a direct result of Defendants' unlawful actions as hereinbefore described, Plaintiff has suffered damages in the amount of \$500,000.00.

SEVENTH-SIXTH: Plaintiff has exhausted all of his administrative remedies under New York law.

SEVENTY-SEVENTH: No prior application for the relief sought herein has been made to this or any other court. Plaintiff has no adequate remedy at law.

WHEREFORE, Plaintiff prays that a judgment be made herein against the Defendants and each and all of them as follows:

A. Declaring unlawful the course of action of the defendants in preventing Plaintiff from enjoying full privileges as a physician and surgeon at defendant UNITED HOSPITAL and in preventing him from being granted professional privileges at other hospitals;

B. Preliminarily and permanently enjoining the defendants and each of them and their agents, servants and employees, successors in office and other persons acting in concert with them from refusing or continuing to refuse to grant and restore to Plaintiff full professional privileges as a physician and surgeon at Defendant UNITED HOSPITAL and from taking any acts or actions the intent and effect of which are to prevent Plaintiff from being granted full professional privileges at other hospitals and from otherwise lawfully practicing medicine;

C. Directing and ordering Defendants and each of them and their agents, servants and employees and successors in office and all others acting in concert with them forthwith to grant to Plaintiff complete restoration of all professional privileges as a physician and surgeon and staff member in good standing at Defendant UNITED HOSPITAL;

D. Awarding to Plaintiff damages and punitive damages in such amount as the Court shall fix against the defendants and each of them for the damages theretofore incurred by Plaintiff as a result of the wrongful actions of the Defendants;

E. Awarding to Plaintiff the costs and disbursements of this action.

F. Awarding to Plaintiff such further and different relief as to the Court may seem just.

Dated: New York, New York
April 7, 1973

JEREMIAH S. GUTMAN
EUGENE N. HARLEY
DONALD I. DOERNBERG
LEVY, GUTMAN, GOLDBERG & KAPLAN
WESTCHESTER CIVIL LIBERTIES UNION
363 Seventh Avenue
New York, New York 10001
Tel: 212 244 6670

Attorneys for Plaintiff

STATE OF NEW YORK)
COUNTY OF NEW YORK)

: ss.:

WILLIAM A. BARRETT, M.D., being duly sworn,
deposes and says:

That deponent is the Plaintiff in the within
action; that deponent has read the foregoing Complaint
and knows the contents thereof; and that the same are true
to deponent's own knowledge, except as to the matters
therein stated to be alleged on information and belief, and
that as to those matters deponent believes them to be true.

Sworn to before me, this

5th day of April, 1973

R. J. BARRETT
NOTARY PUBLIC, State of New York
No. 60-0445150
Appointed for Westchester County
Commission Expires March 30, 1974

William A. Barrett
WILLIAM A. BARRETT, M.D.

February 10, 1971

United Hospital
Port Chester, N. Y.

Att: Mr. Richard Stolnacke

Dear Sir:

On July 1, 1971, I am re-opening my office at
319 Claflin Avenue, Pamaroneck, N. Y.

This is an application to resume my surgical
privileges at the United Hospital as of that date.
This application is being sent in at this time to
insure adequate time for clearance so there will
be no delay to my patients when I resume practice.

I am applying to the United Hospital because
it is the one used by my community. All emergency
ambulance cases are routinely taken to your emer-
gency room before calling the physician of their
choice.

I have applied to no other hospitals.

Sincerely yours,

William A. Barrett, M.D.

Exhibit A

Hospital United City and State Port Chester, N.Y. 26A

Name in Full Barrett William Archibald Date Feb. 22, 1911

Office Address 310 Claffin Ave. Mamaroneck, N.Y. Telephone ON 8-6042

Residence Address same Telephone ON 8-5097

Sex Male Marital Status Married No. of Dependents Three Citizenship U.S.A.

Date of Birth Nov. 10, 1915 Birthplace New York, N.Y.

Premedical Education: College or University Syracuse Liberal Arts

Degree A.B. Date of Graduation 1937

Medical Education: Medical School Syracuse Medical College

Degree M.D. Date of Graduation 1940

Internship: Hospital United Date 1940-41 Rotating ☒ Special ☐

Date _____ Rotating ☐ Special ☐

Licensures: New York April, 1942 License 399048 Registry No. _____ Reciprocity ☐ Examination ☒

Connecticut April, 1952 License 10907 Registry No. _____ Reciprocity ☒ Examination ☐

STATE OF EXAMINATION DATE ISSUED

Has your license to practice medicine in any jurisdiction ever been suspended or revoked? If so, give full details on separate sheet.

Residencies United---rotating Date 1941-44

Brooklyn Veterans-4th & 5th yrs of 5-yr. surgical Date 1954-55

HOSPITAL AND TYPE OF RESIDENCY

Fellowship American College of Surgeons Date 1958

Assistantships _____ Date _____

Teaching Appointments _____ Date _____

Postgraduate Education Numerous full-time courses at Bellevue, U. of Pa. etc. Date _____

INSTITUTION PRECEPTOR ADDRESS

INSTITUTION PRECEPTOR ADDRESS

INSTITUTION PRECEPTOR ADDRESS

Membership on Other Hospital Staffs (past and present) Cross- County, New Milford (Conn.)

At present am only on the New Milford Surgical Staff.

Have your privileges at any hospital ever been suspended, diminished, revoked, or not renewed? If so, explain in full detail on separate sheet.

Membership in Medical Societies Until 1969, NY State, West. Co., A.M.A.

Have you ever been denied membership or a renewal thereof, or been subject to disciplinary proceedings in any medical organization? If so, give full details on separate sheet.

Fellowship: American College of Surgeons ☒ American College of Physicians ☐ Date 1958

Fellowship in other specialty colleges Surg.--Abdom., vascular, internat. Pan-am etc.

Certified by American Board of Surgery Date 1960

REFERENCES AND ADDRESSES (preferably preceptors or previous medical associates) Arthur Diedrick, F.J. Murphy

On separate sheets list scientific papers, essays, and theses you have written, and scientific meetings you have attended during the past 10 years.

Exhibit B

Privileges Desired: General Surgical (excluding G-U) Courtesy staff 27A
beginning July 1, 1971

Previous Experience in Specialties Applied for: Surgical Staff, United Hospital
Surgical Staff, New Milford Hosp. (Conn.)

Average Yearly: Major 240 Minor 100
General Surgery: Number of Operations Performed _____ Number of Operations as Assistant 100

Names of Preceptors _____

Gynecology: Number of Gynecological Operations Performed ?-check your records--it is thousands.

Number of Gynecological Operations Performed as Assistant 20

Names of Preceptors _____

Obstetrics: Number of Normal Deliveries Performed 100 Number of Abnormal Deliveries Performed 20

Names of Preceptors _____

Medicine: (Describe experience in general medicine) not much, except as encountered in surgery,
AND TWO YEARS IN AN EMERGENCY ROOM

Names of Preceptors _____

Other Specialties: (Name and describe experience) _____

Names of Preceptors _____

In making application for appointment to the medical staff of this hospital I agree to abide by its bylaws and by such rules and regulations as it may from time to time enact. Moreover, I specifically pledge that I will not receive from or pay to another physician, either directly or indirectly, any part of a fee received for professional services, and I fully understand that any significant misstatements in or omissions from this application constitute cause for summary dismissal from the staff.

W. B. Banett M.D. M.D.
SIGNATURE OF APPLICANT

CREDENTIALS COMMITTEE

Above Application Was Reviewed by the Credentials Committee with the Following Recommendations:

Appointment to the Honorary ☐ Active ☐ Associate ☐ Courtesy ☐ Division of the Medical Staff

With Privileges in _____ With Privileges Limited to _____

Appointment to be Deferred _____ Appointment Not Recommended _____

Signed: _____ M.D. _____ M.D.

Date _____ M.D.

EXECUTIVE COMMITTEE

Approved by the Executive Committee of the Medical Staff of _____
NAME OF PHYSICIAN

Date _____ SECRETARY OF EXECUTIVE COMMITTEE _____ M.D.

GOVERNING BOARD

As pointed by the Governing Board of _____
NAME OF HOSPITAL

Separate sheet for notations as requested in Form 8-104

Wait
at

New York State license revoked on April 14, 1969 after pleading 28A
guilty to a misdemeanor (original charge abortion)

At this point Connecticut issued me a "warm welcome"

New York State restored my license July 1, 1971. no probation.

As a result of the above, my staff appointment at United was
not renewed for 1969

Also as a result of the above, my membership in Westchester
County Medical Society and New York State Society was not
renewed

Meetings attended

Am. board of Abdominal surgery convention

Conn. chapter American College of Surgeons at Hartford

New Milford Hospital surgical meetings

WILLIAM A. DARRETT, M.D.
319 CLAFLIN AVE
CORNER OF HUSHMORE AVE.
MANHATTEN, N. Y. 10543
TELEPHONE OWENS 8-6042

29A

October 1, 1971

Alfred D. Grant, M.D.
Chairman Credentials Committee
United Hospital
Mortchester, New York

Dear Dr. Grant:

This is a response to your letter received by me on July 1, 1971. In this letter you requested three points of information:

- a) Proof of current valid license of N.Y. State to practice medicine.

A photocopy of order #524, dated January 27, 1971 from the University of the State of New York is hereby enclosed,

- b) Proof of current, valid Professional Liability Insurance in the State of New York.

A photocopy of my policy for \$1 million valid in the State of New York was sent by registered mail to the Executive Administrator, Dr. Richard A. Steinhacke, on February 24, 1971 to complete the list of requirements outlined by him necessary for application to the staff of United Hospital.

- c) Information concerning my current status in the County and State Medical Society.

The application for such membership was mailed upon receipt of your letter.

However, their first meeting will be held October 19th and this answer to your letter I have foolishly delayed pending their response, thinking that this was a requirement for hospital surgical privileges.

Since friends now advise me this is not a requirement, I am answering your letter to avoid further delay in the processing of my application.

Very truly yours,

William A. Darrett, M.D.

WAD/ls
Encl.

Exhibit C

ELLIOTT E. LEVALLEN
ASSISTANT COMMISSIONER FOR
PROFESSIONAL EDUCATION

DIVISION OF PROFESSIONAL CONDUCT
261 MADISON AVENUE
NEW YORK, NEW YORK 10017
212: 687-3513

AUGUST J. BARDO, JR., DIRECTOR

January 27, 1971

William A. Barrett, M.D.
1 Prince Willows Lane
Mamaroneck, New York

Dear Dr. Barrett:

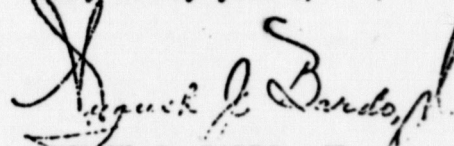
This is to advise you that at today's meeting of the Board of Regents it was voted that your application for modification of the measure of discipline previously imposed be granted to the extent that the order revoking your license be stayed, effective July 1, 1971, at which time your license will be restored.

Section 3.3 (c) of Title 8 of the Official Compilation of Codes, Rules and Regulations of the State of New York provides as follows:

"The Commissioner of Education shall execute all Orders in connection with disciplinary proceedings, as directed by the Board of Regents. Orders shall take effect as of the date of service except as otherwise provided."

It is not administratively possible to arrange for an exact date of service. You should anticipate that the Order will be executed and served in the near future.

Very truly yours,



AUGUST J. BARDO, JR.,
Director, Division of
Professional Conduct

AJB/CPL/els

cc: Louis Zingesser, Esq.

The University of the State of New York

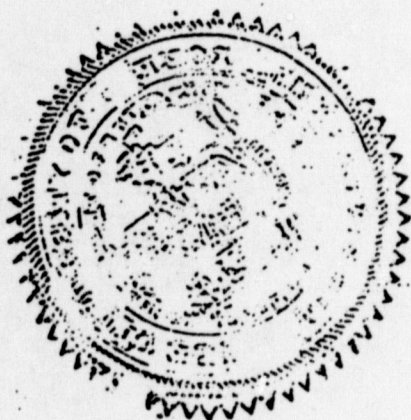
IN THE MATTER

of the

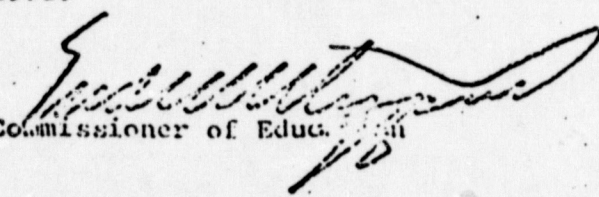
Application for the revocation of the authorization and license heretofore granted to DR. WILLIAM A. BARRETT to practice as a physician in the State of New York, and for the cancellation of his registration as such, and for such other relief as the premises warrant.

No. 524

Pursuant to the report of the Regents Committee on Discipline and to the vote of the Board of Regents on January 27, 1971, it is ORDERED, that the determination of the Board of Regents on March 28, 1969, in the matter of DR. WILLIAM A. BARRETT, and the Order of the Commissioner of Education issued pursuant thereto is modified; and that the Order of Revocation of respondent's license be permanently stayed, effective July 1, 1971, at which time respondent's license be restored to him.



IN WITNESS WHEREOF, I, Ewald B. Nyquist, Commissioner of Education of the State of New York, for and on behalf of the State Education Department and the Board of Regents, do herewith set my hand and affix the seal of the State Education Department, at the City of Albany, this 4th day of February 1971.


Commissioner of Education

SPECIAL MEETING OF THE
JOINT CONFERENCE COMMITTEE
of
UNITED HOSPITAL

In the Matter of
Readmittance to the Medical Staff of
DR. WILLIAM A. BARRETT

Swift Auditorium
United Hospital
Port Chester, New York

February 16, 1972
8:00 p.m.

Exhibit D

COMMITTEE

Mr. H. Clay Johnson
Pres., Board of Trustees

Mr. Richard W. Dammann,
Chairman

Charles R. C. Steers

Richard A. Stolnacke

Mrs. Thomas Lane

Dr. Anthony Balchunas

Dr. Edwin Kaufman

Dr. H. Eugene Seanor

Dr. James A. Sudbay

Dr. David A. Wilson

Dr. Charles Alexander

MR. DUNN: The gentlemen and ladies around this table are members of the Joint Conference Committee. I think you understand that the procedure that we are following here tonight is in accordance with the by-laws of the hospital ^{ON} and application ^{for} of staff privileges as referred to the Credentials Committee of the medical staff, and as then acted on by the Board, and you will have an opportunity to request a hearing, which you did, and under the by-laws the hearing will be held before the Joint Conference Committee, which is the committee appointed by the president, which is fifty percent board members, one of whom is a physician, and the others are physicians from the medical staff.

I think the notice was sent which reflected the reasons for the denial, and I think the members of the Committee that are here tonight are familiar with them, so I'll not repeat them. I have them here.

This is not an adversary proceeding. It is an opportunity for you to present any testimony which you feel the Committee ought to consider in relation to the reasons for which privileges were denied, and it's entirely informal. However, we hope it will be maintained.

relevant to the reasons for which your application has thus far been denied.

I think with that introduction, unless you have any questions, you might proceed.

MR. GUTMAN: Are you suggesting at this point Dr. Barrett should proceed?

MR. DANNEN: Do you mind introducing yourself?

MR. GUTMAN: Miriam Gelband, and my name is Jeremiah Gutman. We are both attorneys associated with the New York State Civil Liberties Union, and we are here at the request of Dr. Barrett in our capacities as attorneys.

In looking at the letter to which you referred, the February 10, 1972 letter from Mrs. Poole to Dr. Barrett, there are several bases listed as the foundation for the denial. First you set forth failure to provide the requested surgical information in New Milford Hospital. I should like to point out to the members of the Joint Committee, because of the shortness of time involved, they have not had an opportunity to see Dr. Barrett's response to that. He addressed a letter

immediately, on February 14th, to Mrs. Poole, and in response to that he said: "I'm surprised you mention the absence of the Milford surgical record. I have reviewed my file and can find no request for such a record. I'll bring to the meeting such documentation as I can on so short notice."

I have examined all requests for information and nowhere in any of the requests, ~~or~~ either on the former accompanying letter of communication or documents, has anybody asked for such information from the hospital at New Milford. However, as soon as Dr. Barrett was advised by this letter of February 10th, he did go to the New Milford Hospital and we have procured here and will be delighted to hand in a letter dated February 15, 1972, and signed by Saul H. Slone, Administrator of that hospital, setting forth the record of Dr. Barrett in this respect. I'll read it to you. I have numerous copies which can be passed around:

"To record exactly the surgical record of Dr. William A. Barrett of Mamaroneck, New York, in our emergency room would be a monumental task. He has worked here since July, 1969. He worked forty percent of the time the first

two years and since October of 1971, works on a twenty-four hour shift a week. During this time he frequently rendered the definitive surgery before admission or discharge. This included tracheostomies, minor fractures, extensor tendon repairs, burns, lacerations - ranging from trivial to massive - shock, hemorrhage, etc.

"I will give the statistics for the last fiscal year of October 1, 1970, to October 1, 1971. Total surgical cases (urgent or emergent) 2,909. Estimating conservatively, he treated thirty percent + 872. These statistics are 10.8% higher than the October, 1969 - October, 1970 year," and it is signed by Mr. Slone as Administrator.

A. You can imagine, being in an Emergency Room from July, 1969 until the present time, Dr. Barrett is not in a position, nor can it be expected of him, that he would keep a record of what he was doing. The record is made by the hospital. The records are in the hospital's care, so that when he received the letter of February 15th, ^{requesting} ~~sending~~ in very general terms surgical information, this was the best we could do on short notice. I think with other documentation which is in

here as to what he is already doing in New Milford, ^{it} ought to satisfy any reasonable inquiry, and since that is the first basis of rejection, it would seem to me that at this point, if any of you have any questions, that you ^{might} ~~will~~ address them to Dr. Barrett, and I'm sure he would like to answer them.

DR. BARRETT: On the first page I have a list of private cases in the operating room.

MR. GUTMAN: That's already attached.

MR. DAMMANN: All right, do you want to continue?

MR. GUTMAN: I'll be happy to, if there are no questions.

Since there are four bases set forth for the rejection, it seems to us that the logical order of procedure would be to deal with one at a time, and this is our response to the first statement. If anyone feels it is inadequate, or requires amplification, we'll be happy to do it before we go on to the next issue.

MR. DAMMANN: Well, if anyone has any questions... it is not my intention to close the hearing when tonight's proceedings are over because there will

be consideration by this Committee, and it may well be there will be questions following the hearing, at which time we may suggest another evening, if that is necessary.

MR. GUTMAN: Then I take it at this point we'll go on to the next issue?

MR. DAMMARI: If anyone has any questions at this point, they are free to raise them.

MR. JOHNSON: Mr. Gutman's introduction of himself.. you introduced yourself as counsel or friend of Dr. Barrett?

MR. GUTMAN: Not as a friend of Dr. Barrett's but as a representative of the Civil Liberties Union. I'm Dr. Barrett's attorney. I'm the New York State Chairman of the First Amendment Committee of the New York State Civil Liberties Union, and the ^{Legal Chairman of} Westchester County and Putnam County Chapter of the Civil Liberties Union, and when Dr. Barrett contacted me to discuss the issues involved here, we were more than happy to provide counsel, and Mrs. Galband and I are that. We are Dr. Barrett's counsel.

MR. JOHNSON: Do you consider his civil liberties to have been invaded?

MR. GUTMAN: ^{Yes.} No. What it means, ^{that we are here} we regard ^{that} the issue of abortion as an important issue, involving civil liberties ^{of people,} many times, and, since the issue that brings us here tonight revolved so heavily about the major issue, as set forth in the letter of February 14th, it seemed to the Civil Liberties Union, ^{that} civil liberties were involved, and counsel was provided on that basis.

MR. JOHNSON: As I understand it, then, the civil liberties issue, as you regard it, concerns the subject matter of abortion, and not Dr. Barrett personally, as far as rights as a physician are concerned - right?

MR. GUTMAN: That's a difficult question to answer, sir. Once a lawyer undertakes to represent a client, just as when a physician undertakes to represent a patient, he represents the interests of that client as an individual in all aspects of the matter within his competence. That is exactly the status which is occupied this evening by Mrs. Gelband and ^{me.} We are Dr. Barrett's lawyers.

MR. DAMIAN: All right, if there are no further questions on this issue, will you proceed, sir?

DR. BARRETT: I would like to ask a question.

MR. CUTLER: The Chairman has ruled. Since there are no further questions on it, we'll go on to the next one, and if any further questions are raised, we'll deal with them as they arise. That's all I can say.

On the second basis, quoting from Mrs. Poole's letter of February 10th, "The operating room records at United Hospital.." Now, I take it, ladies and gentlemen, what we're speaking of here is the fact that on the application was submitted, in response to the question "General Surgery - number of operations performed and number of operations as assistant," he says: "Average general, two hundred forty, and assistant one hundred. Number of gynecology operations performed - check your records. It is in the thousands; and performed as assistant, twenty-five. Normal deliveries one hundred; abnormal deliveries, twenty-five." Now, I take it ^{that} (that last was a quote) that you're saying ^{that} in your records there is something inconsistent with this. At this point I'm going to ask Dr. Barrett to take over and explain what he has reported to you.

DR. BARRETT: All right, on these vast

discrepancies," how is this discrepancy considered in my denial - considered that I told a lie, or that I deliberately altered the records?

MR. DANNON: Well, this Committee is not privy to that because the report was that our records show that what you said indicated a vast discrepancy.

MR. GUTMAN: May I point out, Dr. Barrett made an attempt to get at the records of the hospital.

DR. BARRETT: I was ordered not to go to the record room on September 29, 1969. They needed signatures and dates, and so forth, and they said they would send them from the record room to my office, instead of me appearing. I again tried this afternoon from 3:30 to 5:25, and was unable to get them.

MR. GUTMAN: The situation this afternoon arose out of your letter of February 10th, in which the assertions were made of discrepancies. In his letter to Miss Poole he states: "Let me know what your operating records do show as far as discrepancies." He responded immediately upon receiving the letter and was unable to get a response. We don't know what the discrepancies are. The records, as each of you must know, are in the

hospital.

The records are not arranged in such a manner that the physician can go and pull out everything under his own name. They are arranged in an entirely different manner, and it is an extremely cumbersome and difficult procedure to pull out every chart and go into them to get that kind of information.

I'm going to ask Dr. Barrett where he got these numbers from, the numbers he put on the form. Would you do that?

DR. BARRETT: Yes. I just want to make it clear they are not saying why this discrepancy was considered reason for denial of my application.

MR. GUTMAN: Just answer my question, if you will. Tell the people how it was you picked out these numbers, where you got the information, and how you put it together.

DR. BARRETT: All right - first of all, when I applied for reinstatement, I was sent an application blank to apply as though I were a new resident applying for privileges. They asked for information on this application blank of which the hospital had a complete

record from 1940, including my military service and my residency.

I answered to the best of my ability. On the question of numbers, I can recall in 1965, or '66, passing through the record room one day and they had out new computer forms. I said "What are those?" and they said "This is a record of each surgeon," and I saw "240" after my name, and I said "What does that mean?" and the girl said "Major operations for the past year." I still do not know what "240" is. It seemed reasonable to me, and I do not know yet what the "240" was - was it my P.A.S. number, was it my hospital admissions, was it my total of surgery, but I got the answer of major operations. It stuck in my mind, and six years later I'm asked this question. I know I did maybe five or ten minors for every major, so I put the "240" down, and I multiplied by five minors.

On the next question I was again asked for numbers. I said to myself "This is crazy. They hold the cards in their hands and they say 'We order you to put down what is in our hands.'" It has to be a guess and I might be a bad guesser, but I'm not a liar. There would be no

reason for me to lie about the statistics which you have, and I did not, so I put down those figures, which I said, and I also put down a question mark. I don't know, I don't know. You have the records on me, and that, in essence, is what I said. Now, if I made a bad guess, I'm a bad guesser, but as far as a liar - no, I have never lied to anyone here. That accounts for it, if that's the one you're arguing about.

If these figures are so vastly out of line, I can remember another point....

MR. CUTMAN: Dr. Barrett, during the period of time concerned, were you performing surgical procedures outside of this hospital?

A. Yes, for example, minor surgery included the sutures of lacerations, opening of abscesses, and removal of cysts, both in the Emergency Room and my own office, and that figure of seven hundred fifty-four is not exaggeration. On the two hundred forty, I don't know. That's something which they alone have control over.

Shortly after I asked to be reinstated, I sent this application blank, and that was on the 10th of February, and on February 16th I received the answer along with the

application form.

MR. GUTMAN: When you said "February" you're talking about one year ago?

DR. BARRETT: I'm sorry, February of '71. I received the application blank, and I was surprised, but I shrugged my shoulders and filled it out and was going to mail it in, then I received a letter from Dr. Grant requesting that I see Dr. Wilson, and give it to him. Well, I checked with other hospitals and I brought a photocopy to Dr. Wilson and I had a meeting with him, as they requested, and he read the thing over and we spoke for... I don't know how long - ^{twenty} five minutes, a half hour - and he read it over and he didn't think it was so far out of line. Maybe he felt it was a little high, and I thought he would check, but it certainly wasn't so far out that it was time to say "Hey, Bill, isn't that a little high?" It seemed reasonable to him, and he did about the same amount of surgery that I did over the years.

MR. GUTMAN: At this point I would point out to the members of the Committee ^{that} we are laboring, all of us, both you and we, are laboring under disadvantage.

We have been told there are discrepancies and neither you nor we have been privileged to ^{have} point^{ed} out what the discrepancies are. We have been asked to explain something, the particulars of which have not been presented to us. You asked Dr. Barrett to explain and he did, insofar as he knows and understands it, and again I find myself at the same point where we were on the last issue. Dr. Barrett has presented his explanation, and I would suggest ^{that} if any of the members of the Committee would like to address a question to Dr. Barrett, please do so.

DR. BARRETT: I have two more points to bring out, if I may, since they are not aware of how these things were arrived at.

MR. DAMMANN: I was going to suggest that I think it's practical. If it isn't, I want the administration to let me know. That is, to send to you what the records do show for the period the questionnaire asked, then Dr. Barrett might submit his response or explanation as to the reasons for the discrepancy as it appears between what our records show and what Dr. Barrett put on his application.

Now, by reason of the time limitation, we were

unable to get those figures to you by tonight. Is that practical?

MR. STOLLMACHE: I'll look into that.

DR. BARRETT: Not only is it impossible for the average surgeon - and you can ask any of them here how many appendectomies he did, and he couldn't tell you because he doesn't keep a record. He would almost have to rely on memory to do it. Plus that, we spend one third of each year doing service operations for which there is no fee.

MR. DAMMANN: What are service operations?

DR. BARRETT: Those are the free operations. Before the days of Medicare there were no fees to any surgeon in regard to service cases, and there was a considerable volume, and no surgeon has those records in his office.

You asked me to make a guess. You demanded I make a guess. You hold the cards yourselves. You could have told me. That's why I said "I don't know. Check your records."

MR. STEERS: Dr. Barrett, forgetting the procedures you performed for no fee, the number of service

cases; as you just indicated, you performed quite a few, I would have to assume that you have within your records bills to patients for services you did perform?

DR. BARRETT: Yes, that's true.

MR. STEERS: Based on those records, ^{to} which you may be only ~~your~~ privy, how does this figure of two hundred forty compare?

DR. BARRETT: I could not possibly figure that.

MR. STEERS: Why not?

DR. BARRETT: I have two thousand active charts and two thousand inactive, over a certain number of years. Then I have a large quantity of more charts over a period of ten years.

MR. STEERS: I'm talking about the period the questionnaire relates to.

MR. GUTMAN: The questionnaire doesn't put it that way. It doesn't even specify. It merely says "Number of operations performed," and it doesn't say for what period. Dr. Barrett brought in the concept in answering the question of averaging yearly two hundred forty.

MR. STEERS: Based on his own records, is this two hundred forty accurate, or is it not?

DR. BARRETT: A bill is filed with the patient's chart. Once the case is closed and the bill is paid, in order to get the bills, I would have to go through every one of these thousands of charts I have mentioned and it would be a rather large task.

I could not tell from the chart whether a patient had a cyst removed in the office or was it in the United Hospital and had a gall bladder operation.

MR. STEERS: I'll make no further comment.

DR. BARRETT: In filling out this application form I had many reasons for not spending a lot of time on it. First of all, the information they requested you already had a complete record of. Secondly, I felt it was formality to be rubber stamped and not to be read, since I had an agreement with United Hospital, and I believe Mr. Johnson has heard of it - right, Mr. Johnson?

MR. JOHNSON: You can proceed.

MR. GUTMAN: Outline what you're referring to, Bill.

DR. BARRETT: The agreement was on September

29, 1966. If I would stay away from United Hospital until this thing was all straightened out and I was back in practice, United Hospital would have me back in the operating room on the day that happened - in the operating room - and I, therefore, thought I was giving them ample notice, and whatever questions they had they could ask, and I fully expected on July 1st to be in the operating room.

MR. GUTMAN: With whom did you have this agreement?

DR. BARRETT: Dr. William Jennings, who was at that time President of the Board; Dr. Arthur Deitrich, who ~~in terms of~~ ⁱⁿ hospital politics was Chief of Staff, and who is now on the New York State Medical Board; and Dr. Francis J. Murphy, who was Chief Surgeon.

MR. STEERS: What do you mean by "hospital politics?"

DR. BARRETT: He holds no office. He had been approved Chief of Staff, and he has now graduated to the state level of holding office. I didn't mean politics in the way you took it.

MR. JOHNSON: Dr. Deitrich was not Chief of

Staff. Dr. Sudbay was Chief of Staff.

DR. BARRETT: He was the one before that.

MR. JOHNSON: You mean Dr. Deitrich had ceased being Chief of Staff and Dr. Sudbay was Chief of Staff at that time?

DR. BARRETT: Yes.

MR. JOHNSON: When you mentioned Jennings' name, what form of agreement did that take, with Dr. Jennings?

DR. BARRETT: What do you mean, "...what form?"

MR. JOHNSON: In what form was he party to this agreement?

MR. DARMANN: Was it at a meeting?

DR. BARRETT: No.

MR. JOHNSON: Dr. Jennings did not talk to you?

MR. DARMANN: Only Dr. Deitrich?

DR. BARRETT: Yes.

MR. JOHNSON: And Dr. Deitrich was not a member of the staff then. He was a member of the attending staff of the hospital.

MR. DARMANN: And Dr. Murphy did not talk to

you about it at that time?

DR. BARRETT: No, Dr. Murphy did not talk to me at that time, no.

MR. JOHNSON: So, in connection with this agreement, the agreement was only told to you by Dr. Deitrich?

DR. BARRETT: Yes, that's right. There was not only one but several 'phone calls. It took several meetings between them to arrange this, apparently. I did not ask for this agreement - you people asked for it. They called me and said they would ^{ask} me to drop off the attending staff and go on to the courtesy staff, and I agreed, and within a day they called back and said "We're sorry, we wonder if you would mind changing that," and then they added "If you stay away, you'll be back in the operating room when you get a license."

MR. DAMIANN: When they said "...stay away," they meant write a letter of resignation?

DR. BARRETT: No, that was not part of the agreement. I was on leave of absence.

MR. DAMIANN: This was oral, or did you submit a request?

DR. BARRETT: No, this was oral. I was reappointed to the staff two years.. October of '66, '67, and '68. I was reappointed after leave of absence per agreement.

MR. DAMMEIN: Did you get letters setting forth your reappointment?

DR. BARRETT: Yes, every October. I have them here, but you have them in your own file, I'm sure.

MR. JOHNSON: We would like to see them.

DR. BARRETT: I may not have them in this file, but I'll look.

DR. ALEXANDER: At what point did the letters cease?

DR. BARRETT: They ceased October, 1969, after my court appearance, which was in August, and they said "In view of the fact.." well, "Your staff appointment is not being renewed this year." I don't remember the exact words. I'm telling you as best as I can remember.

MR. JOHNSON: How did you construe that last letter?

DR. BARRETT: I felt that was fair at the time.

MR. JOHNSON: How did you construe that?

DR. BARRETT: They couldn't keep us on a leave of absence without a state license.

MR. JOHNSON: You considered that a termination of your leave of absence?

DR. BARRETT: Of the leave of absence, not of the agreement, though.

MR. JOHNSON: You mentioned my having knowledge of this agreement. I think the record should show I had no knowledge of this agreement until Dr. Jennings sent me a copy of the letter you addressed to him quite recently, something like two weeks ago, in which you made reference to such an agreement. That was the first I ever heard of it, and that was from you and not from him.

DR. BARRETT: Right! Did Dr. Jennings agree that there was such an agreement?

MR. JOHNSON: Dr. Jennings does not concur in that.

DR. BARRETT: He did not concur?

MR. JOHNSON: No.

MR. GUTMAN: Why don't we do this, if we may:

Either he has them or he has to rummage through a lot of papers in his office. We'll dig them up.

MR. DARRMAN: Either submit them, or, if you can't find them, write a letter saying so.

MR. GUTMAN: Right! We'll do so.

MR. DARRMAN: All right, will we proceed?

MR. GUTMAN: So much for Item Two, unless there are any further questions. We're still talking about discrepancies, I guess... all right, Item Three. It says: "Past charges of abortion for which you were indicted, and for which you pleaded Guilty to a lesser charge of assault." It's a fact Dr. Barrett was indicted on an abortion charge. It is a fact, and I'm sure we all realize that ^{after} ~~therefore~~, in full satisfaction of those charges, a plea of Guilty to Assault 3rd Degree, a misdemeanor assault, was entertained and accepted.

Dr. Barrett ^{did} ~~was on~~ ^{on} that arrangement with the District Attorney, and the Court adjudged him guilty of assault. His sentence was a probationary sentence, which he served. Technically, there was a probation, but the probation had no conditions. There was nothing to do. In other words, the Court imposed the technicality of a

sentence, but not an actual one.

^{after}
Therefore, the Board of Regents of the State of New York lifted his license based upon conviction, and Dr. Barrett thereupon applied with full disclosure to Connecticut, which issued him a license to practice medicine there. As you all no doubt know, in February of this year the Commissioner of Education ^{and} of the Board of Regents reinstated Dr. Barrett's license, so that he is, in all respects insofar as the Education Commission is concerned, and the Board of Regents is concerned, fully licensed to practice medicine in this state, and, of course, remains licensed in Connecticut, where he is presently, as you know, working at New Milford Hospital.

The issue, I believe, is really a legal one. I don't want to be technical on a legal subject at a hearing which is, after all, not a legal hearing, but I would suggest that careful consideration be given to using this kind of a basis for a denial of privileges to the physician, when the Commissioner of Education has held that it is not sufficient any longer as the basis for the removal of a license to practice.

The facts are not in dispute. There seems to be

no reason to go into the details to any greater extent than I just recited them. I believe this is a profound issue of ~~for~~^{morality,} professional ethics, in the broader sense of that word, as well as law, and as a civil libertarian, it is my impression, and of course, you're each here to indulge your own impressions and not reflect mine, but it is my impression that the public policy of this state now being that the performance of an abortion is no longer against the law, or against policy, or against the code of medical ethics; that it ceased to be a valid ^{to form} reason ~~on~~ any basis to bar a physician from practicing his profession because in the past he had to plead guilty to an assault charge in order to knock off an abortion indictment.

I think that the policy of this state is reflected not only in the change in the criminal law, but is reflected in the statistical facts of what is going on in this sort of surgery throughout the state. It is also, I think, a question of policy which ought to be considered in dealing with this issue; that we know that there is a shortage of medical personnel in this state. That to debar a physician clearly qualified, with long

experience, from making his services available to the community is to deprive the community and to exacerbate a situation in which there is an inadequacy of medical services to the people of this state, and an inadequacy of delivery ~~assistants~~ ^{system}. This hospital is no different from any other, wishing it could render a greater service in a community where the demand always exceeds the supply.

I also point out to you ^{that,} following the restoration of Dr. Barrett's license by the Education Commission and the Board of Regents, and the Westchester County Medical Society Board of Censors, in September of 1971, also welcomed Dr. Barrett to the professional fold. It is only this hospital which has, so far, stood in the way of his full free practice of medicine, where he was practicing and rendering service to the people of this community, where he has been for so long highly regarded.

MR. JOHNSON: Excuse me, you say only in this hospital, has Dr. Barrett applied, not to any other hospital?

DR. BARRETT: New Milford.

MR. JOHNSON: So you don't mean by saying "...only this hospital," you don't mean we're alone deny-

ing this privilege?

MR. GUTHRIE: No. In that regard I point out something that was ~~in recent~~^{at} issue in litigation involving a hospital in this county, where certain procedures were unavailable because of Board of Trustees' action, ~~at~~^{what} ~~available~~ other ~~in several hospitals~~, and it was ~~suggested to~~ ^{suggested to} the patient that the patient go to some other hospital and have it performed, and the Federal Court, in several such actions, was much impressed by the argument that people are entitled to have a coincidence of two things, that is, medical services in the home community by the physician chosen by the patient.

Dr. Barrett has for years practiced his profession in this community, and this hospital is his home, his school. He was, after all, a resident of this hospital. He has, as ^{he} just mentioned, a couple of thousand active files, and I'm sure you have, during the course of these proceedings and the background to them, been exposed to people in this community expressing a desire that Dr. Barrett be again available to them as their physician. And these people, I think, have a right to be considered.

The medical profession has long been jealous of the extremely personal and private nature of the individual relationship between patient and physician, the fact that the patient chooses the physician. The argument against socialization of medicine was based ^{on} that. It would destroy the privilege of selectivity and personal confidence.

There are in this community a large number of people who have received the benefit of Dr. Barrett's professional services, who want it now and who want it here, and it is for that reason that Dr. Barrett, rather than taking off and going to some other hospital, somewhere else where it might be easier - undoubtedly it would be easier because of the lack of personal notoriety which is connected with this case.

It is for that reason that he insists, as a matter of duty to patient as well as personal and professional self-respect, that it be this hospital, which recognizes that he is and remains a qualified physician, able to practice his profession. It is really an issue which requires much soul-searching, and perhaps, as I mentioned, is much broader than anything ^{to which} I have made ^{reference} in my remarks.

If you have any questions or observations, or wish to interrogate Dr. Barret or ^{Ms} ~~Miss~~ Gelband, or me...

MR. DALMAN: There is no obligation for you or Dr. Barrett to respond to this: I was personally wondering whether there ^{were} ~~was~~ any circumstances surrounding the indictment and subsequent plea of Guilty to the misdemeanor which you or Dr. Barrett would like to bring forward, other than to have the record stand as it does, that there was such indictment and there was subsequently a plea and the lifting of his license.

MR. GUTMAN: I think with one qualification we would have to say no; there is just nothing further to say. The record is clear. Everyone knows what it is and what was involved. The details don't matter, with one exception, and that is something I would like to point out from my own experience as a lawyer, and a factor which was reflected in a recent decision of the Supreme Court of the United States. If the medical profession is in crisis, unable, because of inadequate personnel or facilities to deliver the services it would like to satisfy the insatiable demands of the populace, the legal profession is at least as badly off.

You will notice that the events, the allegations constituting the basis of the indictment against Dr. Barrett are supposed to have occurred in 1966 - right? The Guilty plea was in 1968?

DR. BARRETT: '69.

MR. GUTMAN: It took two years to bring the matter to determination. Certainly, a delay of this kind reflects the failure of the legal system to deliver prompt justice. It reflects the time Dr. Barrett was unable to practice here, and he was kept on leave of absence. It represented the period of time which was a great strain upon him emotionally and financially and otherwise.

The system, however, was unable to complete its task. Now - to the point which arises out of it. What the Supreme Court has recognized, ^{as it} ~~and~~ is called all through the legal profession, is "plea bargaining." When a man is faced with a charge which could lead to a felony conviction, to possible incarceration, even if he believes he has all kinds of defenses, whether they be illegal search defenses or technical defenses, whatever they may be, no one is going to guarantee to him these defenses ~~are not going to succeed, and that he is not going to~~

be convicted of a felony and a possible jail sentence, so when the day comes that the processes of justice, the moment of truth, when the prosecuting officer says "O.K., if you'll cop a plea to Assault 3rd, we'll drop everything," perhaps ninety percent of the cases today are disposed of in that way.

The Supreme Court has just held that a plea taken from an accused under such circumstances, even if the accused later comes in and says "Wow! I have great defenses and want to open the whole thing up," "it is not sporting, you took your chance, you made your deal, you're stuck with it."

I did not represent Dr. Barrett at the time but I have examined the record, however, and it is my opinion that he did have substantial defenses, defenses involving all kinds of constitutional problems. They ^{might} ~~may~~ have succeeded and might not have succeeded. If the prosecutor said to me "If you cop to a misdemeanor I'll recommend no jail time and you don't have to take the risk of anything else," I would have recommended ^{most} ~~more~~ seriously to my client that he consider it and that he not stake the whole game - and it is a kind of a game - on the

possibility of success. I'm sure of that.

So, other than this complication which grows out of the way that legal services and justice are dispensed in our system, the facts are before you. The basic underlying facts are not denied. There is no effort made to say that there was no surgical procedure performed; there is no effort made to say that. That's all behind, the details don't matter. I think he had about an even chance with the defenses he had. He probably made a wise choice in doing it this way.

MR. JOHNSON: Mr. Gutman, a little while ago you referred to Dr. Barrett's relicensing by the State of New York, and his readmission to the Westchester County Medical Society. Were you intending, by that reference, to equate those facts with automatic eligibility for privileges in a hospital such as United?

MR. GUTMAN: Not automatically, no.

MR. JOHNSON: So you're recognizing that a hospital such as ours does regard the right to practice medicine within our hospital as a privilege, and that isn't automatic as far as once being licensed by the state or being a member of the Westchester County Medical

Society?

MR. GUTMAN: I do not suggest that every licensed physician ^{who} ~~that~~ is a member of the Westchester County Medical Society can walk in and practice medicine here.

MR. DAWMAN: Are there any other questions on this issue? If not, do you want to proceed, Mr. Gutman?

MR. GUTMAN: That brings us to the last item on the agenda, "Observations by members of the medical staff of the hospital regarding your conduct and activities in the hospital."

Immediately upon receiving this list of items, Dr. Barrett wrote the letter I have referred to and it includes the following: "Please detail what general observations and by which members of the medical staff, and concerning what conduct in the hospital." I can say, ladies and gentlemen, that we are here at an absolute loss and complete inability to respond. There has been no answer to this inquiry. It is of the essence of orderly procedure, due processes of law, common decency, as well as common sense, that someone be ^{given} had an opportunity

to respond to something specific; that he be entitled to confront his accuser; that he be entitled to explain what it is that is alleged against him.

I submit that there is no possible way in which, sitting here this evening, or at any time, anyplace, under any circumstances, anyone could respond to a charge that anonymous people have made, "...general observations regarding conduct and activities..." It's impossible to respond. I had hoped there would be a particular ^{ization} ~~situation~~ ^{of} ~~in~~ that allegation so we would be able to respond, but it has not been forthcoming.

So, without trying to be "cute," Mr. Chairman, I'm forced to turn the ball back to you and to ask you: Do you know what we're talking about; if you can tell us what these observations are and who made them, perhaps we can respond.

MR. DALMANN: Well, I would be very happy to. As I said at the opening of the hearing, this was not an adversary proceeding. There was and is set forth in the application of Dr. Barrett one of the factors leading to the Board's decision. By reason of practices which we have established in the hospital, and in order to evaluate

and getting peer judgment on the qualifications of physicians to be granted privileges, we have determined that it would be to the best interests of the hospital not to disclose the specific instances or specific names of people who have had reference to conduct.

I think that the only way for you in your position to meet that allegation is merely to indicate that in Dr. Barrett's other contacts and other experiences outside the hospital, or this particular hospital, where he has been well received and well regarded, but we do not feel obliged and will not disclose specific instances that have occurred for that particular reason.

MR. GUTMAN: You have in the record just such outside testimonials. If you would like some more, tell us, and we'll go about getting them, but you leave us no choice but to say that there is, in my judgment, no possible rational basis upon which an unspecified observation by an anonymous accuser on an unmentioned subject, on an ^{called} unreviewed occasion can form the basis for any decision by anybody which pretends to ^{be} lawful action.

MR. DAZMAN: Well, we.. you know what.

MR. GUTMAN: I understand your position, but...

MR. DAMMANN: Well, you have submitted, and if you care to submit any further facts in this connection, we'll be glad to receive them.

MR. GUTMAN: We'll be delighted. We request the opportunity, and we demand the opportunity to respond to whatever these allegations may be; to question the people who make them. After all, it might be a case of mistaken identity. The observer might have been dead drunk at the time; Dr. Barrett might have been in Chicago at the time. We don't know what we're talking about. We don't know who or under what circumstances the accusations are made. There is no way we can respond.

I appreciate your invitation to submit additional data on these facts, but they are not facts, they are absurdities.

MR. DAMMANN: Well, it is up to the Credentials Committee, the medical staff, and the Board to determine whether or not Dr. Barrett was in Chicago, or the person making the allegations was dead drunk, etc.

MR. GUTMAN: All right, fine! Maybe we were in Chicago. Dr. Barrett has been, on occasion, in Chicago and elsewhere. If you will tell me what day

somebody made an observation, and what hour it was made, then we may, indeed, prove he was drunk, or that Dr. Barrett was someplace else. I cannot respond.

MR. DAMMANN: Well, there is no obligation on you to respond, and it is the hospital's position that it is not its obligation to set forth the facts they are requesting.

MR. GUTMAN: I understand your position. I respectfully suggest you're wrong on any basis, from legal to common sensical, from ethical to civil libertarian; that there is no basis.

A Supreme Court decision recently came down on this.

MR. DAMMANN: Supreme Court of the United States?

MR. GUTMAN: Yes, sir, as to the basis in fact.

MR. JOHNSON: By an administrative body. You would so characterize this?

MR. GUTMAN: Yes.

MR. JOHNSON: I just want to have your opinion.

MR. GUTMAN: You're passing upon ^a the substantial right of Dr. Barrett, and the Committee's effect, of its determination, will have not only personal and professional but severe financial repercussions upon Dr. Barrett. You're exercising a power which is exactly analogous^{to} and, in fact, is a judicial function. You're doing exactly what the administrative body does when it determines whether a license shall be issued to a radio station; whether a license shall be revoked to a liquor store, or whatever.

MR. JOHNSON: Has any court held this?

MR. GUTMAN: Oh, yes, in the United States.

MR. JOHNSON: In New York?

MR. GUTMAN: Yes.

MR. JOHNSON: Has held what? That a hospital Committee such as this, or Board such as this, is, in a legal sense, exercising quasi-legal powers?

MR. GUTMAN: Yes. As a matter of fact, I was just in a hospital case such as this, one of the community hospitals structured and financed and operated precisely like this, and, in fact, located in this country.

MR. JOHNSON: Will you give us a citation of

this case?

MR. GUTMAN: Yes, Cafarelli against Peekskill Community Hospital, decided by Judge Tyler in the last several months, held that the Board of Directors of the hospital and hospital medical staff, a sub-committee of the medical group, ^{who} decided what procedures would or could be performed in a hospital, could not act, except in conformity with the limitations ^{imposed} by the United States Constitution and laws. It was 42 U.S.C. 1983; and in that case the decision by the hospital administrators was overturned and the hospital was compelled to perform the procedure, which it didn't want to do.

Mr. JOHNSON:

What law
of the United
States?

Mr. GUTMAN:

Similarly, probably the leading case in its field is the Moses Cone hospital case in Greensboro, North Carolina, where the Supreme Court of the United States held that the hospital, also a community hospital, was bound by the provisions of the Civil Rights Law, and that the actions by the board of the hospital, in setting up how they would run their hospital, had to conform to the standards established by the Fourteenth Amendment to the United States Constitution.

I would suggest, sir, were the final decision of

of the Board, the hospital, to be that Dr. Barrett were to be denied his privilege on the bases set forth in this letter of February 14th, indeed, ~~indeed~~. I would suggest that litigation under 42 U.S. C. Section 1983, would be appropriate, and were Dr. Barrett to continue in his present frame of mind, I would be happy to undertake it and represent him in this respect.

I'm not threatening. You asked a question and I am replying, and I think the court would have jurisdiction. I think we would be successful. You might disagree, and counsel might disagree, and you're at a disadvantage - counsel is not here.

MR. JOHNSON: Many of the cases to which you refer, the Civil Liberties cases, must have dealt with race relations and/or place of origin. You're not identifying any of those issues with this case, are you?

MR. GUTMAN: I'm not, but not all of those cases included a race issue. Section 1983 of the Civil Rights Law, while it grew out of the racial turmoil of the Civil War, by its very language, as well as by its long history, has been held to protect every right granted or guaranteed by any federal law, or by the

constitution.

There are other bases upon which litigation might proceed, and I'm not suggesting any exclusive one, but in response to your question, I would be happy to do so.

MR. DALMAIEN: I would like to say here I don't believe this august body which you're appearing before is either qualified or bound to interpret the legalities of the Civil Rights Law or the bases under which the particular facts of this case...

MR. GUTHMAN: Believe me, sir, I fervently hope we don't end up in court.

MR. DALMAIEN: I think the rectitude or non-rectitude depends on the system by which this hospital has been established, the by-laws for dealing with situations like this. If there is anything else you would like to say at this time, you're welcome to do it, either you or Dr. Barrett.

MR. GUTHMAN: Well, for myself; in your letter of February 10th there were four charges, four bases. These are the considerations which led to the denial of the application. One of them is the New Milford situa-

tion that is before you. The other was the discrepancy in operating room records. Dr. Barrett has rendered his explanation. The third is the abortion matter, and I think we have explored that. There is no dispute on the facts; and finally is the general allegation on which neither Dr. Barrett, nor anyone on his behalf, could in any way respond because of the nature of the allegations.

Since those are the only charges, those are the only things we can respond to, as far as I can see. Unless there are questions, we have nothing further to add.

MR. DAMMANN: Thank you. Are there any questions by any members of the Committee? (no answer) Well, I gather there are none.

I think I would like to state for the record, on review of the record, we are agreed at the present status of the hearing, we are adjourned for the evening.

We are going to submit to Dr. Barrett the operating room records, or the surgical records, if that's the correct definition, so that there will be an opportunity for Dr. Barrett to respond to the discrepancy

issue.. This hearing, therefore, is not closed. If we wish to hear further testimony, or to have other facts presented by Dr. Barrett, we'll advise him. If not, we'll propose to close the hearing and we'll give Dr. Barrett ten days' notice that we are going to close the hearing as of ten days hence, so that he'll have an opportunity, if he wishes, to request a further hearing.

When and if the hearings are finally closed, this Committee will come to its conclusion, as provided by the by-laws, within fifteen days of the closing date.

Is that in accordance with your understanding?

MR. GUTMAN: I understand what you said, sir.

MR. DAMMAN: Is that satisfactory?

MR. GUTMAN: I find nothing objectionable except those objections which I voiced previously.

MR. DAMMAN: Right, which are a matter of record.

MR. GUTMAN: May I respectfully suggest: I have given to the lady that's recording these proceedings my card with my name and address, and I request that every notice sent to Dr. Barrett you simultaneously send me a copy, if you please.

12. DANCEN: Certainly!

(Hearing adjourned at 9:25 p.m.)



HOLLIS S. INGRAHAM, M.D.
COMMISSIONER

STATE OF NEW YORK
DEPARTMENT OF HEALTH
EXECUTIVE DIVISION
84 HOLLAND AVENUE
ALBANY, N. Y. 12208

OFFICE OF THE COUNSEL

DONALD A. MAC HARG
COUNSEL

AMBROSE P. DONOVAN, JR.
CHIEF ASSOCIATE COUNSEL

August 16, 1972

*310
Clafflin
10513*
Jeremiah S. Gutman, Esq.
Levy, Gutman, Goldberg and Kaplan
363 Seventh Avenue
New York, N.Y. 10001

Re: William A. Barrett, M.D.

Dear Mr. Gutman:

The complaint of Dr. Barrett has been referred to this office for official review.

Paragraph 10 of the complaint alleges that the date of the hospital's advice to the complainant of its denial of his application for privileges was May 3, 1972. Public Health Law § 2801-b prohibiting improper practices in hospital staff appointments and extensions of professional privileges became effective May 15, 1972, the date when it was signed into law as Chapter 284 by the Governor.

Since the action of the hospital complained of occurred prior to the effective date of the law defining a prohibited practice, we regret to advise you that the Public Health Council lacks authority to make the investigation requested on the basis of the complaint filed.

Sincerely yours

Donald A. MacHarg
DONALD A. MacHARG
Counsel

DAM:rh

cc - Mr. Richard H. Mattox - For the Public Health Council
Dr. Edward D. Coates

Exhibit E

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
WILLIAM A. BARRETT, M.D.,

Plaintiff,

-against-

UNITED HOSPITAL; RICHARD A. STOLNACKE,
Executive Director of United Hospital,
individually and in his official capacity;
ALFRED D. GRANT, M.D.; JAMES A. SUDBAY,
M.D.; EUGENE WASSERMAN, M.D.; J. DOUGLAS
HALLOCK, M.D.; H. CLAY JOHNSON; WILLIAM H.
JENNINGS; CHARLES R. C. STEERS; WILLIAM
REES; JACK GANTZ; RICHARD D. LOMBARD;
DAVID GILE; RICHARD W. DAMMON; MRS. THOMAS
H. LANE; EDWIN H. KAUFMAN, M.D.; CHARLES
J. ALEXANDER, M.D.; ANTHONY BALCHUNAS, M.D.;
H. EUGENE SEANOR, M.D.; DAVID A. WILSON,
M.D.; JOHN H. DALE, JR., M.D.; LEO T.
DELANEY, M.D.; MRS. EDNA DELZIO, R.N.;
WILLIAM C. FELCH, M.D.; ABRAHAM L. HALPERN,
M.D.; MRS. HARVEY KELSEY; LAWRENCE MARX, JR;
MRS. EMIL MOSBACHER, JR.; MARTIN NESCHI,
M.D.; JOEL J. SCHWARTZMAN, M.D.; JOSEPH
SILBERSTEIN, M.D.; DAVID A. W. WILSON, M.D.;
C. JONATHAN SHATTUCK; SAMUEL DRAGO, M.D.;
VIRGINIA HAGGERTY, M.D.; PHILIP JENSEN,
M.D.; SHELBY LEVER, M.D.; HAROLD ROTH, M.D.;
JACOB SHRAGOWITZ, M.D.; and RONALD DEE, M.D.,

Defendants.

NOTICE OF MOTION

73 Civ. 1716

JUDGE BAUMAN

-----x
S I R S :

PLEASE TAKE NOTICE that upon the annexed affidavit
of RICHARD A. STOLNACKE, sworn to the 6th day of June, 1973, the
annexed affirmation of ROBERT ANDREW WILD, Esq., sworn to the 6th
day of June, 1973, heretofore served and filed herein, and upon
all prior proceedings heretofore had herein, the undersigned
will move this Court at Room , before the Hon. ARNOLD BAUMAN,
at the Courthouse located at Foley Square, in the Borough of
Manhattan, City and State of New York, on the ^{17th} ~~29th~~ day of ^{July} ~~June~~,
1973 at ^{9:30} ~~2:00~~ o'clock ^{A.M.} ~~P.M.~~ in the ^{forenoon} ~~afternoon~~ of that day, or as
soon thereafter as counsel can be heard, for an order pursuant

to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, for judgment on the pleadings and dismissing the plaintiff's complaint on the grounds that the Court lacks subject matter jurisdiction; that the complaint fails to state a claim upon which relief can be granted, and on the further ground that the within action is barred by the statute of limitations, and for an order extending the defendants' time to answer the complaint herein until ten (10) days after the within motion is decided by this Court if decided unfavorably to defendants, and for such other and further relief as to this Court may seem just and proper. It is further requested that the Court order the filing of the attached stipulation extending the time for the defendants named therein to answer or otherwise move against the complaint to and including June 6, 1973.

Dated: Great Neck, New York
June 6, 1973.

Yours, etc.,

HAYT, HAYT, TOLMACH & LANDAU
Attorneys for Defendants,
UNITED HOSPITAL, STOLNACKE, JOHNSON,
JENNINGS, STEERS, REES, GANTZ,
LOMBARD, GILE, DAMMON, LANE, KELSEY,
MARX, MOSBACHER, SHATTUCK, HALLOCK,
and DALE
Office & P.O. Address
55 Northern Boulevard
Great Neck, New York 11021
(516) 466-5800

By: _____
ROBERT ANDREW WILD

TO:
LEVY, GUTMAN, GOLDBERG & KAPLAN
Westchester Civil Liberties Union
Attorneys for Plaintiff
Office & P.O. Address
363 Seventh Avenue
New York, New York 10001
(212) 244-6670

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
WILLIAM A. BARRETT, M.D.,

Plaintiff,

73 Civ. 1716

-against-

UNITED HOSPITAL, et al.,

Defendants.

AFFIDAVIT IN SUPPORT
OF MOTION TO DISMISS
THE COMPLAINT

-----x
STATE OF NEW YORK)

)

SS.:

COUNTY OF WESTCHESTER)

RICHARD A. STOLNACKE, being duly sworn deposes
and says:

1. I am the Executive Director of UNITED HOSPITAL,
a defendant herein, and am fully familiar with all the facts and
circumstances hereinafter set forth. In addition, I am named a
defendant in the within action both in my individual capacity
and in my official capacity as Executive Director of UNITED
HOSPITAL.

2. I make this affidavit in support of the defen-
dants' motion to dismiss the complaint on the grounds that the
Court lacks subject matter jurisdiction; the complaint fails to
state a claim upon which relief can be granted and on the further
ground that the within action is barred by the statute of limita-
tions:

3. The material facts of this case can be summed
up as follows:

(a) The plaintiff, DR. BARRETT, was a member of
the Medical Staff of United Hospital for approxi-
mately twenty years prior to 1966. In 1966 an
indictment was prepared by a Westchester County
Grand Jury charging the plaintiff with two counts
of criminal abortion in violation of the then
Section 125.40 of the Penal Law of the State of

New York. This section made the performance of such an abortion a Class E felony.

(b) On or about June 14, 1968, Judge FRED A. DICKINSON, sitting in Westchester County, Supreme Court accepted the plaintiff's plea of simple assault to all charges levied against the plaintiff. Thereafter, and on or about August 28, 1968, the plaintiff pleaded guilty to the crime of third degree assault, a misdemeanor.

(c) At a regular meeting of the Board of Trustees of United Hospital, held on or about September 16, 1968, the Board of Trustees of United Hospital voted not to reappoint the plaintiff to the Medical Staff of United Hospital for the hospital year of 1969. The Board, in notifying Dr. Barrett of this decision, advised Dr. Barrett that this determination was being made 'without prejudice'. The Board had withheld action on Dr. Barrett's status throughout the years 1967 and 1968, pending the outcome of the criminal action.

(d) On or about April 14, 1969, the plaintiff's license to practice medicine in the State of New York was revoked by the Commissioner of Education upon recommendation of the State Board of Regents and its Discipline Committee and its Medical Grievance Committee. As a result of this, no further action was taken in regard to it by the Defendant Hospital.

(e) On or about February 4, 1971, the Commissioner of Education of the State of New York entered Order Number 524, providing that the order of revocation of plaintiff's license to practice medicine within the State of New York be permanently stayed, effective July 1, 1971.

(f) On or about February 10, 1971, the plaintiff wrote to United Hospital, to the attention of your deponent, notifying the hospital of his desire to obtain privileges at the hospital as of July 1, 1971, the date upon which his license was to be restored. Your deponent promptly forwarded an application for Medical Staff privileges to the plaintiff and requested that he complete same and return it to the attention of the Credentials Committee of the Medical Staff of the hospital. Your deponent further advised the plaintiff of the hospital's procedure with relation to Medical Staff appointments. Under this procedure, the application is first considered by the Credentials Committee who makes a recommendation to the Medical Council of the Medical Staff. The Medical Council then, considering the recommendation of the Credentials Committee, makes a recommendation to the Board of Trustees. The Board, after considering the recommendations of the Credentials Committee

and the Medical Council, then makes a final determination on the application. This final determination is subject to review before the Joint Conference Committee of the hospital, if such determination is adverse to the applicant and if he so chooses.

(g) The plaintiff was interviewed by David Wilson, M.D., Director of Surgery, and his application was thereafter forwarded to the Credentials Committee. The Credentials Committee advised the plaintiff that they could not act on his application until they received further information and requested that plaintiff supply this further information as soon as possible. This request was made on or about June 28, 1971.

(h) Although the plaintiff claims that the hospital was remiss on acting on his application, it was not until October 1, 1971, some three months later, that the plaintiff provided the hospital with the additional information requested.

(i) On November 3, 1971, a special meeting of the Credentials Committee was held to discuss the plaintiff's application. A copy of the minutes of the Credentials Committee is annexed hereto as Exhibit "A". As can be seen, after due consideration, it was the unanimous opinion of the Credentials Committee not to recommend the plaintiff for privileges at the hospital.

(j) On December 14, 1971, the Medical Council of the Medical Staff of the hospital met and considered the plaintiff's application for staff privileges. At this meeting, the Medical Council, after considering the recommendation of the Credentials Committee, unanimously decided not to recommend the plaintiff for appointment and this decision was transmitted to the Executive Committee of the Board of Trustees. A copy of the minutes of the December 14, 1971 meeting of the Medical Council is annexed hereto as Exhibit "B".

(k) On January 4, 1972, the Executive Committee of the Board of Trustees met and considered the recommendations of the Credentials Committee and the Medical Council. After providing due consideration to the recommendations, the Executive Committee decided not to recommend appointment. A copy of the minutes of the Executive Committee meeting of January 4, 1972 is annexed hereto as Exhibit "C".

(l) The Board of Trustees of United Hospital, after receiving and considering all of the aforementioned recommendations, decided that they would not offer privileges to the plaintiff, and they instructed your deponent to write the plaintiff and advise him of this decision. This your deponent did on January 17, 1972. A copy of this letter is annexed hereto as Exhibit "D".

(m) On January 24, 1972, your deponent received a letter from the plaintiff advising that he desired a hearing before the Joint Conference Committee of the hospital. A hearing was scheduled for February 16, 1972. Prior to that date, and on or about February 10, 1972, the plaintiff received a letter from the defendant hospital advising him of the specific reasons for denial of staff privileges. A copy of the February 10, 1972 correspondence from the hospital to the plaintiff is annexed hereto as Exhibit "E".

(n) On February 16, 1972, a hearing was held. The plaintiff was present and he was accompanied by counsel. The plaintiff was provided an opportunity to present his response to the reasons for denial of staff privileges. A copy of the transcript of the appeal hearing is annexed to the complaint already served in this matter and as so annexed, is marked Exhibit "D" to the complaint.

(o) On March 27, 1972, the Joint Conference Committee convened for the purpose of considering the results of the hearing held on February 16, 1972. At this meeting, it was unanimously concluded that all prior action, of all committees, dealing with the plaintiff's application for privileges, be affirmed, and that privileges be denied the plaintiff. A copy of the minutes of this meeting is annexed hereto as Exhibit "F".

(p) A special meeting of the Executive Committee of the Board of Trustees was held on April 17, 1972, in order to receive and act upon the recommendation of the Joint Conference Committee. After due consideration, the Board's Executive Committee unanimously voted to affirm the Joint Conference Committee and to deny privileges to the plaintiff. A copy of the minutes of this meeting is annexed hereto as Exhibit "G".

(q) This recommendation was received by the Board of Trustees at their next regularly scheduled meeting in April, 1972, and at this meeting, the Board, after considering all the prior proceedings, unanimously voted to affirm the previous denials, and ordered your deponent to so advise the plaintiff. This was done on May 3, 1972, when your deponent wrote the plaintiff and told him of the hospital's final determination. A copy of this letter is annexed hereto as Exhibit "H".

4. Annexed hereto as Exhibit "I" is a copy of Article III of the Medical Staff Bylaws, Rules and Regulations,

as in force during the period in question. This Article lays out the procedure for initial appointment and/or re-appointment to the Medical Staff of UNITED HOSPITAL. It is clear from even the closest reading of Article III that the plaintiff was granted every punctilio of due process afforded by the hospital's Bylaws. The procedure set forth in Article III was followed without deviation. The plaintiff's application was conscientiously reviewed by each Committee charged with that responsibility, and each Committee, independently recommended non-appointment after such independent review and after reviewing the prior Committee's recommendation and the facts. Your deponent is personally acquainted with the individuals serving on these various Committees and in fact had the opportunity to attend many of the meetings at which the plaintiff's application was considered. Your deponent is convinced after such firsthand observations that the defendants and each and every one of them acted in good faith, objectively and with only the best interests of the hospital in mind. The denial of plaintiff's application was a non-discriminatory, non-arbitrary, valid exercise of the discretion legally delegated to the Board of Trustees of the hospital after considering the views of the plaintiff's peers and others charged with reviewing applications for staff privileges.

5. During the period in question, UNITED HOSPITAL was and still remains accredited by the Joint Commission on Accreditation of Hospitals (J.C.A.H.). This organization is the nationally recognized accepted body for promulgating standards for American hospitals. The J.C.A.H. periodically review the internal organization and functioning of the vast majority of hospitals in this country. This review includes the Hospital Bylaws and the Medical Staff Bylaws, Rules and Regulations. In order to be accredited, a goal for which every hospital strives

and a status necessary to participate in most state, federal and local programs, the Medical Staff Bylaws must adhere to certain prescribed standards. UNITED HOSPITAL's accreditation at the time in question specifies that its Medical Staff Bylaws were in order and did meet the then existing standards of the Joint Commission on Accreditation of Hospitals. Compliance with such Bylaws therefore, is compliance with reasonably promulgated standards, reasonably imposed, and neither this court nor any external body should attempt to substitute its judgment for that of the Board of the Hospital arrived at in accordance with such Bylaws.

6. Your deponent is informed by the attorneys for the defendants herein that the complaint fails to state a claim upon which relief can be granted. UNITED HOSPITAL is a private, not-for-profit hospital. Its trustees, officers, and members of the Medical Staff are not state or federal officials, but rather private individuals working for a privately incorporated, independently existing institution. Although the hospital is involved financially with both the state and federal government, and is subject to regulation, its "private" status is unaffected.

7. In your deponent's day to day supervision of the Hospital, questions of compliance with state, federal and local laws frequently arise. However, decisions regarding day to day affairs and indeed the exact method and manner of such compliance is left almost exclusively to the discretion of the Hospital. At no time either past or present have the activities of the Hospital been regulated to such an extent that the Hospital's Board of Trustees and its designated officials no longer control the operation of the Hospital. The Hospital is really no different than any other business which is subject to governmental regulation. The applicable laws have been promulgated for the public

good as have the laws regarding the airline industry, communications industry, transportation industry, etc. But, the existence of such laws and the compliance therewith does not convert a private enterprise into a public one. Your deponent is fully familiar with the Mulvihill case cited in the attorney's affirmation in support of this motion and your deponent feels strongly that the decision of Judge METZNER most accurately reflects the status of UNITED HOSPITAL, namely, an institution closely regulated and closely involved with governmental authorities but not an institution, owned, operated or controlled by such governmental authorities to the extent that it has no independent existence. In fact, were this Court to adopt the plaintiff's views, it would be tantamount to a decision that private hospitals no longer exist and that Government has totally assumed the responsibility for institutional health care in this country. Such a position would undoubtedly cause great consternation among all private hospitals in this country and to Government itself which has despite such regulation, continually denied that the independence of the private hospitals of the United States has been obliterated.

8. I am also informed by the attorneys that the substantive law of the State of New York is applicable in this case and that such law uniformly holds that where a private hospital has acted in accordance with its Bylaws and has acted in a reasonable manner that a court will not substitute its judgment for that of the Board of Trustees of the Hospital. Having observed and participated in the entire decision making process in regard to the plaintiff's application, your deponent does not see how any outside body, including this Court, could brush aside the judgment of numerous physician-peers of the plaintiff and the decision of numerous lay individuals specifically charged by law with the operation of the Hospital and substitute therefore the

Court's own decision. It is clear to your deponent that both necessity and reason dictate the view that has long been followed in New York. The issue of an applicant's fitness to practice in a private institution is not readily measured by external standards. Mere training or licensure does not and should not qualify an applicant for privileges at a given private institution. It must be for that institution, acting in a non-discriminatory manner and in a generally accepted manner to review such applicant and to arrive at its own conclusions. To undermine this process is to remove from the governing body of the institution the authority to control its affairs while nevertheless burdening the governing body with the responsibility for the results of such affairs. Such an incongruity would undoubtedly discourage members of the Board of Trustees of this Hospital and every other hospital similarly situated from continuing to serve in such role since such service is on a completely voluntary basis and since the reason for such service is eliminated if the duty to control does not carry with it the power to control.

9. Your deponent is informed by the attorneys for the defendants herein that they verily believe that this Court lacks subject matter jurisdiction to entertain this action.

10. The plaintiff alleges that the jurisdiction of the Court is invoked pursuant to Title 28 U.S.C. Sections 1331, 1343(1), (2) and (4), 1361; pursuant to the First, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution; and pursuant to Title 42 U.S.C. Sections 1983, 1985, and 1986. In reviewing these provisions, your deponent believes they are not applicable to this case for reasons substantially similar to those previously stated, i.e. the hospital is a

private corporation and not an arm or agent of any federal, state or local governmental agency.

11. The Bylaws of the Hospital and of its Medical Staff are the "bill of rights" of those individuals directly involved with the Hospital. The plaintiff has had the benefit of each and every right allowed under such Bylaws and this Court therefore has no issues before it capable of its consideration.

12. Your deponent has been informed by the attorneys for the defendants herein that this is an action in the nature of mandamus and as such an action, it must be commenced within four months after the determination to be reviewed becomes final and binding upon the aggrieved party. As set forth in paragraph 3(q) of my affidavit, the plaintiff was notified of a final determination on May 3, 1972. The within action was commenced on or about April 18, 1973, some eleven months later. By virtue of this, the within action is barred by the statute of limitations.

WHEREFORE, your deponent respectfully prays for an order dismissing the complaint upon the ground that the Court lacks subject matter jurisdiction, the complaint fails to state a claim upon which relief can be granted and/or that the within action is barred by the statute of limitations. It is further requested that plaintiff be made to pay the costs of this proceeding, and that the defendants be awarded such other and further relief as to this Court seems just and proper.

RICHARD A. STOLNACKE

Sworn to before me this
6th day of June, 1973.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
WILLIAM A. BARRETT, M.D.,

Plaintiff,

-against-

UNITED HOSPITAL, et al.,

Defendants.

AFFIRMATION

73 Civ. 1716

-----x
ROBERT ANDREW WILD, an attorney and counsellor admitted to practice before the United States District Court for the Southern District of New York affirms the following statements to be true under penalties of perjury:

1. I am a partner in the law firm of HAYT, HAYT, TOLMACH & LANDAU, Esqs., attorneys for the defendants specified in the notice of motion, and am fully familiar with all the facts and circumstances hereinafter set forth.

2. I make this affirmation in support of defendants' motion to dismiss the complaint in this action on three (3) separate grounds:

- (1) The complaint fails to state a claim upon which relief can be granted.
- (2) The Court lacks jurisdiction to entertain this matter.
- (3) The within action is barred by the statute of limitations.

FAILURE TO STATE A CLAIM
UPON WHICH RELIEF CAN BE
GRANTED.

3. Plaintiff alleges in Paragraph "THIRD" of his complaint certain circumstances which he believes sufficient to characterize the actions of the Defendant Hospital (and the

individual defendants by virtue of their service on Hospital Boards and Committees) as actions of the "State". Among these circumstances are: funding, regulation and control (in whole or in part) by the State; including the United States of America; in such areas as construction, acquisition, payments, Medicare, Medicaid, taxation and other similar areas referred to by the plaintiff.

4. This contention by plaintiff is by no means unique. The very same arguments have been presented to and rejected by this Court within the past two (2) years.

5. On May 5, 1971, Hon. CHARLES M. METZNER, Judge of the United States District Court for the Southern District of New York decided the case of Mulvihill et al, v. Julia L. Butterfield Memorial Hospital, et al 329 F. Supp. 1020 (S.D.N.Y. 1971). In that case the hospital moved pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure to dismiss the complaint for failure to state a claim upon which relief can be granted. In granting the hospital's motion, Judge METZNER discussed specifically the question of whether the State of New York is so associated with the conduct of Butterfield Hospital (a private, not-for-profit hospital identical to the Defendant Hospital) that the hospital's action in discharging two physicians can be considered the action of the State. The plaintiff in that case asserted that the requisite state involvement is found in the fact that the hospital received construction funds pursuant to the Hill-Burton Act, and also is subject to detailed regulation by the State of New York the very same allegations made by plaintiff in this action. However, Judge METZNER found that mere participation in the Hill-Burton program is not sufficient to render a private hospital a "public" one.

6. Furthermore, Judge METZNER found that all hospitals in New York State are subject to intricate state regulation pursuant to the New York Public Health Law. While admittedly, the State of New York plays a substantial role in supervising the operations of private hospitals, nevertheless, this general regulatory scheme does not in any way associate itself with or influence the internal decisions of a hospital's Board of Trustees to hire or fire, admit or terminate Medical Staff members. The mere fact that New York regulates the facilities and standards of care of private hospitals or offers them financial support does not make the acts of these hospitals in discharging physicians the acts of the state." Judge METZNER concluded his decision as follows:

"The purpose of New York's regulation of its private hospitals is to assure quality medical service throughout the state. Only in their dealings with the general public are private hospitals in New York affected by state laws. But the state has never shown an interest in supervising or influencing the purely internal affairs of these hospitals, and the courts of New York have emphasized that they will not interfere in decisions by private hospitals to hire, fire or discipline staff members as long as these decisions are in accordance with the hospital's by-laws. (Citing cases).

Given this pattern of state financial support and regulation, the court finds no state action involved in the refusal by Julia L. Butterfield Memorial Hospital to reappoint these two plaintiffs.

The motion to dismiss is granted with leave to replead if plaintiffs are so advised."

7. Judge METZNER, in the previously quoted portion of his decision points out that the Courts of New York State have never interfered with the internal workings of a hospital and have uniformly refused to substitute their judgment for that of the Governing Body. Since it is the substantive law

of New York which must be applied in this case, the long line of decisions of the New York Courts must be controlling. The first case in New York to discuss this issue was Van Campen v. Olean General Hospital, 210 App. Div. 204, 205 N.Y.S. 554 (1924), aff'd. 239 N.Y. 615, 147 N.E. 219 (1925) and the cases have been uniform and consistent in favor of the hospitals right up to the present time (see Schiffman v. Manhattan Eye, Ear, Throat Hospital, 35 App. Div.2d 709, 314 N.Y.S.2d 823 [1st Dept. 1970]).

8. The cases involving this issue are of course far more extensive than indicated above. It is therefore your affiant's intention to include in a memorandum of law to be submitted on the return date of this motion a more complete analysis of these cases as well as a more detailed analysis of all other points raised in this affirmation.

LACK OF JURISDICTION

9. The complaint in this action asserts that the jurisdiction of this Court is invoked pursuant to the following provisions of law:

- (a) Title 28 U.S.C. Section 1331, 1343(1), (2) and (4).
- (b) Title 28 U.S.C. Section 1361.
- (c) First, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution.

10. Section 1331 requires that the amount in controversy exceeds \$10,000.00 and arise under the Constitution, laws or treaties of the United States. This is commonly referred to as the requirement that there be a federal question.

11. The provisions of Section 1343 which plaintiff refers to allow actions to be brought in the District Court to recover damages under certain circumstances. Specifically, referring to the plaintiff's complaint, these circumstances may be summarized as follows:

- (1) Where there has been a denial of equal protection under the laws or of equal privileges and immunities under the laws or denial of the rights of citizens of the United States.
- (2) Where defendants had knowledge and failed to and could have prevented the acts enumerated in (1) above.
- (4) Where defendants have denied to plaintiff civil rights granted under any act of Congress.

12. Section 1361 basically allows an action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

13. Referring to these sections, 1331 is a general jurisdictional provision and depends upon the applicability of the other cited provisions for its effectiveness.

14. Section 1343 only gives this Court jurisdiction where the activities complained of occurred under "color of state law". 1343 refers specifically to Title 42 U.S.C. Section 1985 and every case decided under this section indicates that for action to be maintained under this chapter the state itself must be involved in the conduct complained of, or the alleged wrongdoer must be acting under its authority or wielding power of the sort commonly attached to the state.

15. As indicated in the previous discussions surrounding the Mulvihill case, the action of the hospital is in no way the action of the satte and these sections therefore are not applicable to the defendants. This is also true of Section 1361 whose applicability is in fact even more remote than that of the other cited provisions. It simply cannot be reasonably argued that the Hospital or any of the other defendants can be deemed an officer or employee of the United States or an agency of the United States so as to be subject to this mandamus action.

16. The balance of the basis claimed for jurisdiction is the following amendments to the Constitution:

- (a) First Amendment - freedom of religion, speech, press, assemble peacably, petition the government for redress of grievances.
- (b) Fifth Amendment - Grand jury indictment required before a citizen can be held to answer for a capital crime, no double jeopardy, no citizen shall be made to give evidence against himself in a criminal matter, due process, and just compensation for condemnation.
- (c) Eighth Amendment - Excessive bail shall not be required, nor excessive fines imposed nor cruel and unusual punishment inflicted.
- (d) Ninth Amendment - All other personal civil rights are retained even though they are not enumerated in the Constitution.
- (e) Fourteenth Amendment - due process must be provided by states and states may not deny any individual the equal protection of the laws.

17. While each of the foregoing Amendments do of course contain different provisions thereby safeguarding different freedoms to citizens of the United States, their use in this case is but for a single purpose, namely to invoke the jurisdiction of this Court. Whether or not jurisdiction can be predicated on the provisions of these Amendments is a single issue not actually requiring separate treatment of each of the individual Amendments. The guaranty of rights in the cited Amendments is a protection against Government action and not against wrongs done by individuals. The guaranty covers a situation when the state either directly or indirectly through its agents or employees acts in such a way as to deny an individual the rights and freedoms enumerated. Not only do the various cases require that the action be state action but a logical reading of the various cited Amendments leads to the inescapable conclusion that it is not within the province of any of the defendants in this action to grant or deny any of the rights and freedoms contained in these Amendments as such Amendments have been interpreted by case law.

18. In the Mulvihill case the Court faced squarely the question of whether or not the hospital was subject to the mandates of the Fourteenth Amendment of the United States Constitution. The Court answered the question as follows:

"A private hospital is subject to the precepts of the Fourteenth Amendment only if its actions are tinged with some measure of state involvement. It is an uncontraverted principle that the action inhibited by the due process clause of the Fourteenth Amendment is only such action as may be said to be that of the states. The Civil Rights Cases, 109 U.S. 3 (1883). Private

conduct abridging individual rights does not violate the Fourteenth Amendment unless to some significant extent the state in any of its manifestations has been found to have become involved in it." Burton v. Wilmington Parking Authority, 365 U.S. 715. 722 (1961).

Your deponent has previously referred to the conclusions drawn by Judge METZNER in the Mulvihill case that the necessary state action was not available and therefore the action was not within the purview of the United States Constitution or the other applicable provisions of federal law. Certainly if the Fourteenth Amendment is not applicable in this case neither are any of the other Amendments to the United States Constitution since the main impact of the Fourteenth Amendment was to make the first ten Amendments applicable to the states and not merely to the federal government.

19. The plaintiff seeks, an extremely broad interpretation of the provisions of the United States Constitution to invoke the jurisdiction of this Court on the basis of unsupported allegations that the activities and the general demeanor of the Hospital is such that it may be deemed to be an arm of the state or federal government. This is tantamount to assuming a set of facts and then using such facts to prove another set of facts. If the first set of facts falls then the whole line of reasoning must fall and in the instant case since the Hospital is an independent, private institution and not an arm of the state or federal government, the jurisdiction of this Court does not extend to the conduct complained of by the plaintiff.

STATUTE OF LIMITATIONS

20. Notwithstanding the various labels given by plaintiff to the relief requested, plaintiff seeks one thing, and one thing only - that is, for this Court to compel the Hospital to grant plaintiff Medical Staff privileges. While there is also a claim for money damages, such claim is incidental to and cannot be separated from the claim for staff privileges, for if the plaintiff is not entitled to such privileges, then he is not entitled to be compensated for not obtaining them.

21. An action to compel the granting of Medical Staff privileges is an action in the nature of mandamus. Black's Law Dictionary defines mandamus as follows:

"MANDAMUS. Lat. We command. This is the name of a writ (formerly a high prerogative writ) which issues from a court of superior jurisdiction, and is directed to a private or municipal corporation, or any of its officers, or to an executive, administrative or judicial officer, or to an inferior court, commanding the performance of a particular act therein specified, and belonging to his or their public, official, or ministerial duty, or directing the restoration of the complainant to rights or privileges of which he has been illegally deprived. Lahiff v. St. Joseph, etc., Soc., 76 Conn. 648, 57 A. 692, 65 L.R.A. 92, 100 Am.St.Rep. 1012."

22. If we examine the plaintiff's "WHEREFORE" clause it is clear that what the plaintiff is seeking is the "... restoration of ... rights or privileges of which he has been illegally deprived - i.e. - MANDAMUS."

23. Turning to the laws of the State of New York (the controlling law in this case) there are countless cases standing for the uncontrovertible proposition that it is the gravamen of a cause of action which determines which statute of limitations is controlling. The test is the essence of the action and not merely the label given to it by the plaintiff.

24. An action in the nature of mandamus is subject to the four month statute of limitations provided in the New York State Civil Practice Law and Rules, Section 217.

25. The plaintiff was advised on May 3, 1972 that his application for Medical Staff privileges had been finally denied. This denial was a final determination on the merits. The time for the plaintiff to commence this action began to run on the date he received this denial. The instant action was commenced on April 18, 1973. This is eleven and one-half months after a final determination was rendered and sent to the plaintiff. By virtue of this his time to commence this action has more than run and the statute of limitations is therefore a full and complete defense to the entire action.

26. Not ly should the plaintiff be prevented from pursuing this action by virtue of the statute of limitations, but his own laches should also operate as a bar. Having delayed almost one (1) full year in the commencement of this action thereby allowing memories to fade, important parties to relocate and alleged damages to accrue the plaintiff should not be permitted now to continue this action. Certainly if, as plaintiff contends, staff privileges at Defendant Hospital are necessary to him and to his patients, then this action could have been commenced at the time of his denial and not almost a year later.

27. Your affirmant verily believes that he has stated sufficient facts to warrant a dismissal of the complaint on the grounds that the plaintiff's complaint fails to state a claim upon which relief can be granted; the Court lacks subject matter jurisdiction of this action; and this action is barred by the statute of limitations.

WHEREFORE, your affirmant prays that an order be entered dismissing the complaint on the grounds that it fails to state a claim upon which relief can be granted, that this Court lacks the necessary jurisdiction to entertain this action and that the plaintiff failed to commence his action within the appropriate time, and for such other and further relief as to this Court seems just and proper.

Dated: Great Neck, New York
June 6, 1973.

ROBERT ANDREW WILD

THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

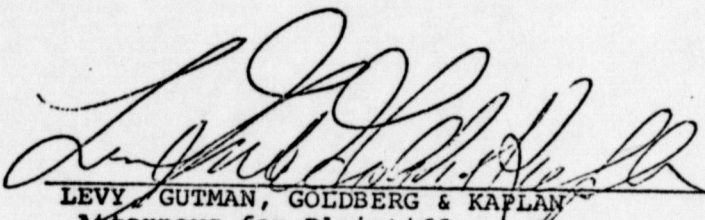
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WILLIAM A. BARRETT, M.D.,	:	INDEX NO. 73 Civ. 1716
Plaintiff	:	
- against -	:	<u>STIPULATION EXTENDING</u>
UNITED HOSPITAL, et al.,	:	<u>TIME TO ANSWER</u>
Defendants	:	

----- X

IT IS HEREBY STIPULATED that the time for the defendants
UNITED HOSPITAL, STOLNACKE, JOHNSON, STEERS, JENNINGS, REES,
GANTZ, LOMBARD, GILE, DAMMON, LANE, KELSEY, MARX, MOSBACHER,
SHATTUCK, to appear and to answer, amend or supplement the
answer as of course or to make any motion with relation to the
summons or the complaint in this action, be and the same hereby
is extended to and including the 6th day of June, 1973.

Dated: Great Neck, New York
May 29, 1973


LEVY GUTMAN, GOLDBERG & KAPLAN
Attorneys for Plaintiff
Office and Post Office Address
363 Seventh Avenue
New York, New York 10001

MINUTES OF A MEETING OF
THE CREDENTIALS COMMITTEE

NOVEMBER 3, 1971

The Chairman of the Credentials Committee, Dr. Alfred Grant presided, calling the meeting to order at 4:15 p.m.

Present were: Dr. Samuel Drago
Dr. Philip Jensen
Dr. Shelby Lever
Dr. Harold Roth
Dr. Jacob Shragowitz

Mrs. Barbara Poole (Secretary)

The Chairman stated that the purpose of the special meeting was to discuss the matter of Dr. William Barrett and his application for membership in the Medical Staff of United Hospital.

As background information to the meeting, the Chairman reviewed the file of the applicant.

A registered return-receipt requested letter was forwarded to the Executive Director of United Hospital on February 10, 1971 announcing Dr. Barrett's intention to reopen his office in Mamaroneck on July 1, 1971 and requesting application to resume surgical privileges at United Hospital as of that date.

The Executive Director sent an application form to Dr. Barrett informing him of hospital procedure whereby the application would be considered by the Credentials Committee which would make its recommendation to the Medical Council. Medical Council would, in turn, direct its recommendation to the Board of Trustees for consideration and action.

The Chairman of the Credentials Committee acknowledged to Dr. Barrett the forwarding of an application and instructed him to contact Dr. David A. W. Wilson, Director of Surgery, for an interview.

The doctor's application was sent directly to the Executive Director. A copy was submitted to Dr. Wilson at the time of the interview.

EXHIBIT "A"

A report of this interview dated March 22, 1971 and signed by the Director of Surgery indicated that an interview had been conducted on March 19, 1971. Dr. Barrett's reasons for applying for privileges at United Hospital were discussed at that time. Since he intended to return to Mamaroneck where he claimed he enjoyed a considerable following it would be necessary that there be a hospital in which he could practice and refer patients. The Director of Surgery advised Dr. Barrett that if his application was approved he would be on probation and under supervision. He requested a list of major surgical procedures performed at the New Milford, Connecticut, Hospital, the institution in which Dr. Barrett was presently enjoying privileges. The Director of Surgery further indicated in his report personal observations of Dr. Barrett's character and recommended careful consideration of the application.

The application indicated that Dr. Barrett received his medical degree from Syracuse Medical College, did his internship at United Hospital in 1940/41 and was licensed in the State of New York in 1942. He enjoyed a rotating residency at United in 1941/42 and a surgical residency at Brooklyn Veterans in 1954/56. He is a fellow in the American College of Surgeons. The application was requesting general surgical privileges, excluding GU, and membership on the Courtesy Staff beginning July 1, 1971. As an addendum to his application, Dr. Barrett indicated that his New York State license had been revoked on April 14, 1969 after pleading guilty to a misdemeanor with an original charge of abortion which resulted in his staff appointment at United not being renewed in 1969. His New York State license was to be restored July 1, 1971 with no probation period. In making application for appointment to the medical staff of United Hospital, Dr. Barrett agreed to abide by its laws and by such rules and regulations as it may from time to time enact. He specifically pledged that he would not receive from or pay to another physician either directly or indirectly any part of a fee received for professional services and he indicated full understanding that any significant misstatements in/or omission from his application would constitute cause for dismissal from the Staff. Dr. Barrett gave as references the names of Drs. Arthur Diedrick and Francis J. Murphy.

Further to background, the Chairman stated that Dr. Barrett had been charged/performed abortions on two girls in September of 1966. In June of 1968 he was permitted to plead guilty to a reduced charge of simple assault. He received a suspended sentence by a Westchester Court and had his license to practice revoked by the State Board

of Regents following recommendations by its discipline committee and its medical grievance committee. As a result, he applied and was given leave of absence from United Hospital and his appointment was never renewed. The Director of Surgery indicated that following his interview with Dr. Barrett he reviewed the surgical activity of the physician for the year preceeding his leaving the Hospital staff since the physician had indicated a yearly average of 240 major and 750 minor operations. It was revealed that the total more closely approximated 80 major cases and 53 minor cases, excluding GYN.

The Credentials Committee Chairman then read excerpts from two letters of recommendation on behalf of Dr. Barrett written by Saul H. Slone, Administrator of New Milford Hospital and Norris A. Wildman, President of New Milford Hospital. Mr. Slone attested to Dr. Barrett's integrity, intelligence and good character, his high degree of competence in cases of surgery performed at New Milford Hospital and commendation for his patient care. Mr. Wildman indicated that he had known Dr. Barrett on both a social and professional basis and considered him a valuable member of the hospital staff and a valued employee in the Emergency Room. He noted that the doctor's work had been exemplary and conscientious.

The Credentials Committee Chairman revealed that Dr. Barrett next wrote to the Executive Director on May 28, 1971 asking that an early reply be returned to him concerning a decision in his behalf since the July 1st date of his office reopening was fast approaching. The Executive Director replied on June 2nd and indicated he would discuss Dr. Barrett's inquiry with the Chief of Staff. He again wrote to Dr. Barrett on June 11th telling the doctor that he should be hearing from either Dr. Grant as Chairman of the Credentials Committee or Dr. Alexander concerning the processing of his application within the next few days.

The Chairman of the Credentials Committee wrote to Dr. Barrett on June 28th advising the doctor that his application for staff privileges was lacking in certain essential information and asking the doctor to submit that information at his earliest convenience. For proper evaluation of the application, it was essential that Dr. Barrett submit proof of current valid New York State license to practice medicine, proof of current valid professional liability insurance in the State of New York, and information concerning current status in the County and State

Medical Society. In reply to Dr. Barrett's request concerning a decision on the application, the Chairman advised that no final decision would be forthcoming until the early part of October of 1971. He asked the doctor to contact him if there were any questions regarding the matter.

Dr. Barrett replied to Dr. Grant's request on October 1, 1971 providing a photocopy of order #524 dated January 27, 1971 from the University of the State of New York which was proof of current valid license of New York State to practice medicine and proof of current valid professional liability insurance in the State of New York. Membership in the County and State Medical Society is no longer a requirement.

On October 1, 1971 Dr. Barrett requested of the Executive Director a copy of the bylaws of the medical staff of United Hospital. He had been in conversation with Dr. Diedrick who had told him that the bylaws were being revised by Dr. Gundy and the bylaw committee. Dr. Diedrick had offered to send to Dr. Barrett a copy which had never arrived and he was therefore requesting same of the Executive Director. The Executive Director complied with Dr. Barrett's request and a copy of the present Medical Staff bylaws was forwarded to the doctor on October 19th.

This concluded all available correspondence which could be considered for review by the Chairman of the Credentials Committee and conversational review was encouraged by the Chairman at this point.

Credentials Committee is left with a situation whereby an applicant has applied for reinstatement on the Medical Staff, said applicant previously practicing at United Hospital but who had been found guilty of an assault charge and whose license had been temporarily revoked by the State of New York. A letter in file attests that a leave of absence had been granted.

Dr. Drago theorized the situation as it would relate to a brand new applicant and not an applicant who had previously been a member of this medical staff. He questioned the concern which would be evidenced if the committee were considering a newcomer to the service area who had had a revoked license, who had lied on his application or whose credentials were less than those of other new men and who had been guilty of assault referable to an act of medical nature.

The subject of Dr. Barrett's livelihood was presented as a measure of deliberation. It was pointed out that Dr. Barrett enjoyed privileges at Cross County Hospital. His privileges were pending at St. Agnes Hospital. It was further pointed out that the State of Connecticut had in Dr. Barrett's own words "given him a warm welcome". Denial of privileges at United Hospital did not preclude the doctor from earning a living.

It was further determined that the Credentials Committee would sustain the position not to interview Dr. Barrett personally since Dr. Wilson had done so at the Committee's request.

In conclusion it was agreed that the applicant had not provided surgical information from New Milford Hospital, that vast discrepancies existed between the applicant's statements and operating room records, that the applicant had been indicted for the charge of abortion and pleaded guilty to a lesser charge of assault by his own admission, that it was determined that the applicant retain characteristic bordering on arrogance as attested to by the Chief of Surgery following a personal interview with the applicant. That while the committee understood it was not their position to become involved with character only, their job was to determine whether or not they wished to professionally associate both themselves and the Hospital with a man of this caliber, and finally through a thorough evaluation of both past and current correspondence, by a report of personal interview, it was the consensus of the Credentials Committee not to reflect discredit on the medical community and the image in the Hospital by the recommendation of this applicant for membership on the medical staff. It was not the desire of the members of the Credential Committee to associate themselves with a physician who was medically and ethically irresponsible, an acknowledged criminal or an individual who could cause disbelief in the accuracy or the authority of programs of peer review and audit currently being established by the medical staff and administration of the Hospital. Dr. Grant called for a vote of the committee and the committee was unanimous in their decision not to recommend the applicant for staff privileges at United Hospital.

UNITED HOSPITAL
PORT CHESTER, NEW YORK

MEDICAL COUNCIL MEETING
December 14, 1971

Meeting:

The monthly meeting of the Medical Council of the Medical Staff of United Hospital was held on Tuesday, December 14, 1971 at 4:p.m. in the Swift Auditorium.

Prior to the meeting Dr. Silberstein introduced Mrs. Viola Nelson who spoke on the establishment of the "Hot Line". Mrs. Nelson requested more volunteers to handle phone calls.

Attendance:

Dr. Charles Alexander, Chief of Staff presided and the following members were in attendance:

Dr. Anthony Balchunas	Dr. Edwin Kaufman
Dr. Leo Delaney	Dr. Herman Scheps
Mrs. Edna Delzio	Dr. Joel Schwartzman
Dr. Samuel Drago	Dr. H. Eugene Seanor
Dr. William Felch	Dr. Joseph Silberstein
Dr. Alfred Grant	Mr. Richard Stolnack
Dr. Abraham Halpern	Dr. David A. Wilson
Dr. Engel Hevenor	

From the Staff:
C. Jonathan Shattuck
Patricia Ramirez

Correspondence:

Dr. Alexander read a letter from Dr. Arthur Stea a podiatrist, who requested that podiatrists be granted privileges on the Medical Staff. It was decided that Drs. Wilson, Grant, and Alexander will meet with several podiatrists to determine the extent of privileges they are requesting. A report will be made to the next meeting of the Medical Council.

Committee Reports:

Credentials Committee: Dr. Grant reported that at the last meeting of this Committee the applications of several physicians were reviewed and he presented the following recommendations to the Medical Council:

Paul Rutkowski, M.D. - Associate Staff with privileges in Ophthalmology

Leonard Finkelstein, M.D. - Associate Staff with privileges in Internal Medicine.

EXHIBIT "B"

William Barrett, M.D. - Application denied because his credentials did not meet the standards of the Credentials Committee at this time.

On a motion duly made and seconded, these recommendations were approved for forwarding to the Board of Trustees.

Utilization Review: Dr. Scheps stated that Medicaid requires medical certification on patients who stay beyond 21 days in the Hospital, for review by Medicaid officials.

Medical Records: There was no report on this Committee, but Dr. Halpern asked that a psychiatrist be appointed to the Committee. Dr. Alexander will appoint one.

Infection Committee: Dr. Silberstein reported that evaluation of Hospital sanitation was now being discussed at Committee meetings. He asked that Directors of Services let him know how they wish their isolation cases handled. The infection control manual presently in use is being revised.

Ad Hoc Committee on Inhalation Therapy: Dr. Delaney reported on items discussed at the last meeting of this Committee, namely; the appointment of Dr. Paglia as director of the department; what fees are to be charged and how they are to be handled; what compensation to Dr. Paglia, and finally the possibility of dissolving the present Committee and naming a smaller committee, such Committee to include Dr. Paglia. After discussion a motion was made seconded and passed to dissolve the present Committee and to name a smaller one.

Medical Staff Changes:

Dr. Alexander read letters of resignation from
Dr. Wilfred Wingebach - Consultant - Neurosurge
Dr. Allyn Ley - Consultant - Hematology

Dr. Kaufman recommended that Dr. Jerry Edelman be advanced from Associate Attending to Attending Physician in Medicine.

These resignations and promotion were accepted by the Medical Council for forwarding to the Board of Trustees.

Report of the Chief:
of Staff

Dr. Alexander had no report to make, but he suggested that anyone who had items he wished to have on the agenda for Medical Council meet see Mrs. Ramirez prior to the day of the meetings.

Report of Executive

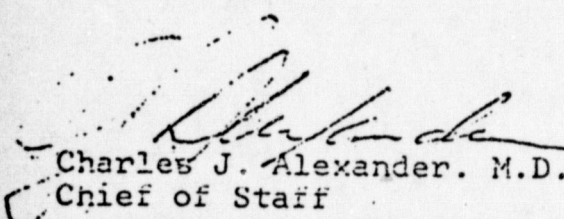
Mr. Stolnacke reported that the Long Range Planning Committee would be expanded to include several members of the Medical Staff and Board of Managers.

The Board of Trustees authorized the hiring of the consulting firm of Cresap, McCormick and Paget to conduct a survey in conjunction with the Long Range Planning. These consultants will meet with members of the Medical Staff over the next few months and their survey is expected to be completed by April, 1972.

Old Business:

Dr. Halpern speaking for his colleagues in the Department of Psychiatry, expressed dissatisfaction with correspondence related to the recent annual appointment letter and requests for proof of malpractice insurance. Dr. Halpern was informed that this matter was being reviewed and revised.

There being no further business the meeting adjourned at 5:00 p.m.


Charles J. Alexander. M.D.
Chief of Staff

EXECUTIVE COMMITTEE
January 4, 1972

A special session of the Executive Committee of United Hospital was called for the evening of January 4, 1972. Charles R. C. Steers presided.

Attendance: Richard W. Dammann
Frank M. Donahue
Jack Gantz
David E. Gile
H. Clay Johnson
Mrs. Thomas H. Lane
Lawrence Marx, Jr.
Mrs. Emil Mosbacher, Jr.
Richard A. Stolnacke

Staff: Russell A. Arent
John O. Parker
Mrs. Barbara Poole
C. Jonathan Shattuck
Gary N. Wiessen

Guest: Lawrence Bassett

- I. The chairman explained that Organization Resources Counselors and Administration had recommended that the wage and salary program be increased the maximum of the limit permitted under Phase II of the federal Wage & Salary guidelines.

The chairman explained that the presently proposed increase was envisioned in the 1970-71 operating budget and was scheduled for implementation on August 22, 1971. President Nixon's announcement of the wage and price freeze on August 15, however, deterred such implementation. The chairman introduced Mr. Lawrence Bassett of Organization Resources Counselors to review present conditions at United and neighboring hospitals regarding wage and salary programs. Mr. Bassett expressed urgency in the implementation of United Hospital's deferred program as outlined in his letter of December 13, 1971 to the Director of Personnel. A copy of this letter is attached to these minutes.

EXHIBIT "C"

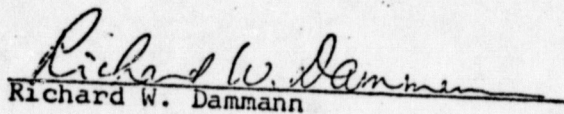
-2-

Mr. Bassett stressed that the new scales were on the conservative side and might require revision in mid 1972 as the labor market stabilizes and union negotiating patterns develop. He further informed the committee that by implementing the new wage and salary program United Hospital would be initiating performance standards set by supervisory personnel based upon objectives set by management.

The Director of Financial Services submitted a report with conservative projections of increases and the reimbursement rate, the effect of a 6% increase in room rates and other potential sources of cash involving cost containment credit collection procedures. A copy of Mr. Arent's report is attached. This report revealed that the Hospital expects an increase in case in 1972 in the amount of \$528,500 which offsets the cost of the new wage and salary program which is estimated to be \$363,376.

Upon motion made and seconded and unanimously passed, the proposed wage and salary program was approved to be implemented in accordance with the economic stabilization guidelines.

II. The Executive Committee, after due consideration of the recommendations of the Credentials Committee and of the Medical Council, denied the application of William Barrett, M.D. for Medical Staff privileges at the hospital.


Richard W. Dammann

January 17, 1972

William A. Barrett, M.D.
210 W. 11th Street
Manhasset, New York 10543

Dear Dr. Barrett:

After due consideration of the recommendations of the Credentials Committee and the Medical Council, the Board of Trustees of United Hospital has denied your application for medical staff privileges.

If you wish to present your position in regard to the denial of your application, you may request a hearing before the Joint Conference Committee. Such hearing will be held within 30 days after your request is received providing such request is forthcoming within 10 days of the date of this letter.

In the event we do not receive your request to appear before the Joint Conference Committee within 10 days from the date of this letter, we will assume that you have accepted the Board's decision and do not desire to pursue this matter further.

Very truly yours,

Richard A. Stelmacke
Executive Director

RAS/ps

EXHIBIT "D"

Dr. Barrett

February 10, 1972

William A. Barrett, M.D.
310 Claflin Avenue
Hawthorne, New York 10540

Dear Dr. Barrett:

In accordance with your letter of January 24, 1972 received by this office on January 26th, please be advised that a hearing before the Joint Conference Committee of the Hospital will be held on Wednesday, February 16, 1972 at 8:00 p.m. in Swift Auditorium for you to present your position and testimony in regard to the denial of your application for medical staff privileges.

The hearing will be conducted on an informal basis in order to permit full disclosure without regard to strict procedural rules.

At the conclusion of the hearing the Joint Conference Committee will consider all matters presented and will, within 15 days of such hearing, indicate its recommendations to the Board of Trustees who will, as soon as possible thereafter, notify you of its decision. In order to assist you in preparing for the hearing, the following is a summary of the considerations which led to the denial of your application:

Your application for privileges at the Hospital was denied because of your failure to provide requested surgical information from New Milford Hospital; vast discrepancies between statements on your application and operating room records of United Hospital; past charges of abortion for which you were indicted and for which you pleaded guilty to a charge of assault; and general observations by members of the medical staff of the hospital regarding your conduct and activities in the hospital.

EXHIBIT "E"

William A. Barrett, M.D.

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If you have any questions with regard to the above, please feel free to contact the undersigned. If, for any reason, you are unable to attend the hearing on the date indicated above, at least three days notice should be given so that all interested parties can be timely notified.

Very truly yours,

Barbara Poole (Mrs.)
Assistant Secretary
Board of Trustees

W/

UNITED HOSPITAL
Port Chester, N.Y.

JOINT CONFERENCE COMMITTEE

The Joint Conference Committee reconvened on Monday, March 27, 1972 at 5:30 p.m. in the Administrative Conference Room for the purpose of concluding the matter of Dr. Barrett's appeal concerning the denial of medical staff privileges. Richard W. Dammann, Chairman, presided.

Attendance:

Charles J. Alexander, M.D.
Anthony Balchunas, M.D.
H. Clay Johnson
Edwin Kaufman, M.D.
Mrs. Thomas Lane
Eugene Seanor, M.D.
Richard A. Stolnacke
David A. W. Wilson, M.D.

From the Staff:

Mrs. Barbara Poole
Robert A. Wild, Esq.

The statistics pertaining to operations performed by Dr. Barrett for the years 1963 through 1966, as requested by Dr. Barrett on February 16, 1972, were forwarded to Dr. Barrett and his counsel. Since no request was forthcoming from Dr. Barrett that another meeting be scheduled at which additional material pertinent to his application would be presented, the hearing was automatically closed on March 17, 1972.

It was unanimously concluded that the prior actions of the Credentials Committee, the Medical Council and the Executive Committee be affirmed. This recommendation will be forwarded to the Executive Committee for prompt action.

Richard W. Dammann
Richard W. Dammann, Chairman

EXHIBIT "F"

UNITED HOSPITAL
Port Chester, New York

EXECUTIVE COMMITTEE
April 17, 1972

A special meeting of the Executive Committee was held on Monday, April 17, 1972 at 8:00 P. M. in Swift Auditorium. The Chairman, Charles R. C. Steers, presided.

Attendance: Paul Adler
Charles J. Alexander, M.D.
Richard W. Dammann
David E. Gile
Jack Gantz
George Haley
Mrs. Harvey Kelsey, Jr.
Mrs. Thomas Lane
Anthony J. Posillipo
William M. Rees
James A. Sudbay, M.D.

Staff: Calvin H. Douglas
John Owen
Mrs. Barbara Poole
C. Jonathan Shattuck

The purpose of the special meeting was twofold: to act upon the recommendation of the Joint Conference Committee that the application of Dr. William A. Barrett for medical staff privileges at United Hospital be denied; to act upon the recommendation of the Finance Committee that the Rowena Lee Teagle School of Nursing be closed.

The Chairman of the Joint Conference Committee reviewed in detail the facts pertaining to the denial of Dr. Barrett's application as recommended by the Credentials Committee on November 3, 1971, the Medical Council on December 14, 1971, and the Executive Committee on January 3, 1972. Dr. Barrett was notified of this decision on January 17, 1972.

In keeping with the bylaws of the medical staff, Dr. Barrett was permitted to request an informal hearing before the Joint Conference Committee to present testimony pursuant to the denial of staff privileges. This request was honored by a meeting of the Committee on February 16, 1972. Dr. Barrett and his counsel requested additional statistics pertaining to operations at United

EXHIBIT "G"

Executive Committee
April 17, 1972

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Hospital between the years 1963 and 1966.

The hearing was adjourned but held open to permit a summary of statistical information to be forwarded to Dr. Barrett on February 25, 1972. Dr. Barrett was also advised that if he wished to respond in regard to this additional information, notice should be given within seven days, or March 3, 1972. Subsequently, the transcript of the proceedings of February 16, 1972 was forwarded to Dr. Barrett's counsel and the seven day period extended to March 10.

Dr. Barrett was notified by the Assistant Secretary of the Board of Trustees on March 16, 1972 that since no request for a further hearing had been forthcoming, the Joint Conference Committee considered the matter closed, would convene promptly to consider the material presented earlier, and make its recommendation to the Board of Trustees or its Executive Committee as soon thereafter as practicable.

The Joint Conference Committee convened on March 27, 1972. It was unanimously concluded that the prior actions of the Credentials Committee, the Medical Council and the Executive Committee be affirmed. The recommendation was to be presented to the Executive Committee as promptly as possible.

The Chairman of the Joint Conference Committee further reviewed with the members of the Executive Committee pertinent background material, thoroughly clarifying and responding to all questions.

Upon motion made by James A. Sudbay, M.D. and seconded by George Haley, the recommendation not to appoint Dr. William A. Barrett to the medical staff of United Hospital was unanimously approved.

The second item of business to come before the Committee was the consideration and recommendation of the Finance Committee on April 10, 1972 that the Rowena Lee Teagle School of Nursing of United Hospital be closed as soon as practicable.

The Chairman reviewed earlier recommendations by the Consultants of Cresap, McCormick & Paget in January 1970. Since the School of Nursing is presently operated at an annual loss of \$150,000, it was deemed financially judicious to expedite this decision.

A summary of actions which would be undertaken relative to the phasing out of the School was distributed and discussed and is attached to these minutes.

Executive Committee
April 17, 1972

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The Committee suggested that the President contact the Teagle Foundation as promptly as possible to discuss this action.

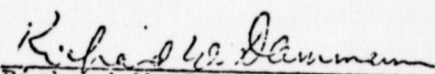
The Chief of Staff indicated that the Medical Staff will be generally supportive of this decision. Board of Manager members of the Executive Committee concurred.

A motion was made by Richard W. Dammann and seconded by Anthony J. Posillipo that the School of Nursing be closed with the graduation of the current undergraduate class, and that assistance be offered to each present student and those accepted for the Fall of 1972 in the matter of transfers and enrollment in other schools. The motion was unanimously carried.

A resolution was passed recommending that the Chairman of the School of Nursing Advisory Committee consider not holding the Ziter piano concert in light of actions that have been taken by the Executive Committee to close the School of Nursing.

The items listed in the summary of phasing out actions were reviewed and approved. A press release will be prepared by the Community Relations Department for review by the President and Chairman of the Executive Committee prior to distribution to the media for April 21 dissemination.

There was no further discussion of the two items before the Executive Committee, and the meeting adjourned at 10:15 P.M.


Richard W. Dammann, Secretary

May 3, 1972

William A. Barrett, M.D.
310 Claflin Avenue
Hamaroneck, New York 10543

Dear Dr. Barrett:

After due consideration of the recommendations of the Credentials Committee and the Medical Council and after consideration of the recommendations of the Joint Conference Committee and the proceedings had before such Committee, United Hospital has denied your application for medical staff privileges.

Very truly yours,

Richard A. Stolnacke
Executive Director

RAS/bp

cc: Jeremiah Gutman, Esq.

EXHIBIT "H"

ARTICLE III

APPOINTMENT TO THE MEDICAL STAFF

Section A - Qualifications: To be eligible for appointment to the Medical Staff, an applicant must be a graduate of a Medical School approved by the American Medical Association; must be licensed to practice in the State in which he resides; must be qualified for membership in his local Medical Society; and must have his main office within the service area of the Hospital.

Section B - Ethics: Each applicant for appointment to the Medical Staff shall sign the following pledge: "As a condition to my appointment to the Medical and Dental Staff of United Hospital, I promise to abide by its By-Laws and Rules and Regulations and to conduct myself in an ethical manner according to the Principles of Ethics of the American Medical Association. I also promise to refrain from the practice of paying another physician, either directly or indirectly, any part of the fee received for professional services".

Section C - Term of Appointment: Appointment and reappointment to the Medical Staff shall be for a term of one year or, in the case of an interim appointment, to the end of the then current Hospital year.

Section D - Procedure for Initial Appointment: Applications for initial appointment to the Medical Staff shall be presented in writing on the prescribed form and shall set forth the qualification and recommendations of the applicant as well as the pledge required by Section B of this Article. The application shall be submitted to the Administrator, who will transmit it to the Credentials Committee. The Credentials Committee shall meet with the applicant for the purpose of assessing his qualifications and characteristics and acquainting him with the situation pertaining to his professional opportunities in the community. The Chairman will report to the Medical Council the findings and recommendations of the Credentials Committee which shall be made as soon as possible but not later than three months following receipt of the application. If a recommendation or deferral is made by the Credentials Committee, it shall be followed by a later recommendation to accept or reject the application at the next monthly meeting of the Medical Council. Following receipt of the final recommendation of the Credentials Committee, the Medical Council shall promptly submit to the Trustees

EXHIBIT "I"

its recommendation with respect to the application, such submission to be made by the Chief of Staff. The Administrator will notify the applicant of the action taken by the Trustees.

Section E - Procedure for Re-appointment: The Medical Council shall annually submit to the Trustees recommendations for re-appointments to the Medical Staff in sufficient time to permit the Trustees to make such appointments prior to the beginning of the next Hospital year.

Section F - Nature of Appointment: All appointments and re-appointments to the Medical Staff shall include a designation of the Staff category; grade of Service; Division of Service; and type of privileges for which the appointment is made, said privileges to be determined as provided in Article VII hereof.

Section G - Appeals: In cases of rejection of an application for appointment or non-renewal or cancellation of an appointment, the applicant shall be afforded the opportunity of appearing and stating his case before the Joint Conference Committee, the members of which will thereafter make their respective recommendations to the Trustees and to the Medical Council as the case may be.

Section H - Emergency Appointment: In cases in which the life of a patient is in immediate danger and in which delay in administering treatment might increase such danger, the Administrator after conference with the Chief of Staff, has the authority to make an appointment to the Medical Staff providing temporary privileges for the Attending physician or for a Consultant. In any such case the Chief of Staff shall give an authoritative opinion as to the competence and ethical standing of the physician so appointed and in the exercise of such temporary privileges he shall be under the direct supervision of the Chief of Staff. Emergency appointments will not be granted to attend more than four patients in any one year and after this number of appointments the physician will be required to receive a regular appointment to the Medical Staff before being allowed to attend additional patients in the Hospital.

Section I - Retirement Age: No physician shall be eligible for appointment or re-appointment to the Attending Staff if his age is 65 years or over. This provision shall not apply to the Honorary category of the Medical Staff.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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WILLIAM A. BARRETT, M.D.,

Plaintiff,

- against -

UNITED HOSPITAL; RICHARD A. STOLNACKE,
Executive Director of United Hospital,
individually and in his official capacity;
ALFRED D. GRANT, M.D.; JAMES A. SUDBAY, M.D.;
EUGENE WASSERMAN, M.D.; J. DOUGLAS HALLOCK,
M.D.; H. CLAY JOHNSON; WILLIAM H. JENNINGS;
CHARLES R. C. STEERS; WILLIAM REES; JACK
GANITZ; RICHARD D. LOMBARD; DAVID GILE;
RICHARD W. DAMON; MRS. THOMAS H. LANE;
EDWIN H. KAUFMAN, M.D.; CHARLES J.
ALEXANDER, M.D.; ANTHONY BALCHUNAS, M.D.;
H. EUGENE SEAMOR, M.D.; DAVID A. WILSON,
M.D.; JOHN H. DALL, JR., M.D.; LEO T.
DELANEY, M.D.; MRS. EDNA DELZIO, R.N.;
WILLIAM C. FELCH, M.D.; ABRAHAM L.
HALPERN, M.D.; MRS. HARVEY KELSEY;
LAWRENCE MARK, JR.; MRS. EMIL MOSBACKER,
JR.; MARTIN ESCHIS, M.D.; JOEL J.
SCHWARTZMAN, M.D.; JOSEPH SILBERSTEIN,
M.D.; DAVID A. W. WILSON, M.D.; C.
JONATHAN SHATTUCK; SAMUEL DRAGO, J.D.;
VIRGINIA MAGGENTY, M.D.; PHILIP HENSEN,
M.D.; SHELBY LEVIER, M.D.; HAROLD ROTH,
M.D.; JACOB SHRAGOWITZ, M.D.; and
RONALD DEE, M.D.,

Defendants.

NOTICE OF MOTION

73 CIV. 1716
Judge Arnold Bauman

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S I R S:

PLEASE TAKE NOTICE that upon the annexed affidavit
of CHARLES J. ALEXANDER, M.D., sworn to the 29th day of June,
1973, and upon all the papers, pleadings, and proceedings
heretofore had herein, the undersigned will move this Court
at Room 706 before the Honorable Arnold Bauman, at the United
States District Court House, located at Foley Square, in the
Borough of Manhattan, City and State of New York, on the ninth
day of August, 1973, at 9:30 in the forenoon of that day or as soon

thereafter as counsel can be heard for an Order pursuant to Rule 12(b)(1) and Rule 12(b)(6) of the Federal Rules of Civil Procedure, for judgment on the pleadings and dismissing the complaint on the grounds that there is no subject matter jurisdiction, that the complaint fails to state a cause of action, and that the action is barred by the Statute of Limitations, and for a further order extending the defendants' time to answer the complaint herein until ten (10) days after the within motion is decided by this Court, if decided unfavorably to the defendants, and for such other and further relief as to this Court may seem just and equitable including the direction of the filing of the annexed Stipulation extending the time for the defendants hereinafter named to answer or otherwise move against the complaint until July first, 1973.

Dated: White Plains, New York
June 29, 1973

Yours, etc.,

CLARK, CAGLIARDI & MILLER, ESQS.
Attorneys for Defendants GRANT,
SUDBAY, WASSERMAN, KAUFMAN,
ALEXANDER, BALCHUNAS, SEANOR,
DELANEY, FELCH, HALPERN,
NESCHIS, SCHWARTZMAN,
SILBERSTEIN, WILSON, DRAGO,
HAGGERTY, JENSEN, LEVER,
ROTH, SHRAGOWITZ and DEE
Office and P. O. Address
175 Main Street
White Plains, New York 10601
914 - 946 - 8900

TO:

By Henry G. Miller

LEVY, GUTMAN, GOLDBERG & KAPLAN, ESQS.
Attorneys for Plaintiff
Office and P. O. Address
363 Seventh Avenue
New York, New York

HAYT, HAYT, TOLMACH & LANDAU, ESQS.
Attorneys for Co-Defendants
55 Northern Boulevard
Great Neck, New York 11021

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT

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WILLIAM A. BARRETT, M.D., Plaintiff,

- against -

UNITED HOSPITAL; RICHARD A. STOLNACKE,
 Executive Director of United Hospital,
 individually and in his official capacity;
 ALFRED D. GRANT, M.D.; JAMES A. SUDBAY,
 M.D.; EUGENE WASSERMAN, M.D.; J. DOUGLAS
 HALLOCK, M.D.; H. CLAY JOHNSON; WILLIAM H.
 JENNINGS; CHARLES R. C. STIERS; WILLIAM
 REES; JACK GANTZ; RICHARD D. LOMBARD;
 DAVID GILE; RICHARD W. DAIMON; MRS. THOMAS
 H. LANE; EDWIN H. KAUFMAN, M.D.; CHARLES J.
 ALEXANDER, M.D.; ANTHONY BALCHUNAS, M.D.;
 H. EUGENE SEMOR, M.D.; DAVID A. WILSON,
 M.D.; JOHN H. DALE, JR., M.D.; LEO T.
 DELANEY, M.D.; MRS. EDNA DELZIO, R.N.;
 WILLIAM C. FELCH, M.D.; ABRAHAM L. HALPERN,
 M.D.; MRS. HARVEY KELSEY; LAWRENCE MARX, JR.;
 MRS. EMIL MOSBACHER, JR.; MARTIN NESCHIS,
 M.D.; JOEL J. SCHWARTZMAN, M.D.; JOSEPH
 SILBERSTEIN, M.D.; DAVID A. W. WILSON, M.D.;
 C. JONATHAN SHATTUCK; SAMUEL DRAGO, M.D.;
 VIRGINIA HAGGERTY, M.D.; PHILIP JENSEN, M.D.;
 SHELBY LEVER, M.D.; HAROLD ROTH, M.D.;
 JACOB SHRAGOWITZ, M.D.; and RONALD DEE, M.D.
 Defendants.

73 CIV 1716

Judge Armond Bauman

----- x

STATE OF NEW YORK)
 : ss:
 COUNTY OF WESTCHESTER)

CHARLES J. ALEXANDER, M.D., being duly sworn, deposes
 and says:

1. I am the Chief of Staff at United Hospital and a
 defendant in this action and make this affidavit in support of
 the motion by the defendants named in the notice thereof to
 dismiss the complaint on the grounds that the Court lacks
 jurisdiction of the subject matter, the complaint fails to
 state a cause of action, and the claims therein are barred by

the Statute of Limitations.

2. The defendants on whose behalf this motion is being made have received an extension of time to answer or otherwise move against the complaint until July first, a copy of which extension is annexed hereto as EXHIBIT A.

3. I am advised by my attorneys that the attorneys for co-defendant UNITED HOSPITAL and other defendants in this action have made a similar motion returnable before this Court on the same date as the instant motion. Your deponent joins in that motion on behalf of the defendants listed in the Notice of Motion.

4. The facts are briefly as follows. Dr. Barrett, the plaintiff herein, was prior to 1966 a medical staff member of the United Hospital for approximately twenty years. Upon information and belief in September of 1966 Dr. Barrett was arrested and charged with criminal abortion in violation of the then Sections 125.40 et seq. of the Penal Law of the State of New York. I am advised that violation of the aforementioned sections of the Penal Law is a Class E felony.

In August of 1968 Dr. Barrett upon information and belief pled guilty to the crime of assault in the third degree in full satisfaction of all charges then pending against him. In September of 1968 the Board of Trustees of United Hospital voted not to reappoint Dr. Barrett to the Medical Staff of the Hospital for the year 1969. In April of 1969, Dr. Barrett's license to practice medicine in the State of New York was revoked by the Commissioner of Education upon recommendation of the State Board of Regents.

Thereafter, upon information and belief, on February 4, 1971, Dr. Barrett's license to practice medicine within the State of New York was restored, effective July 1, 1971. On February 10, 1971, Dr. Barrett wrote to the United Hospital to request admittance to the Medical Staff at the Hospital as of the date of the restoration of his New York State license. Thereafter, the Hospital's Executive Director, Mr. Stolnacke, sent a formal application form to Dr. Barrett and advised him of the Hospital's procedure with relation to Medical Staff appointments. Essentially, the By-laws of the Hospital in effect at that time relating to medical appointments required that the application form be submitted to the Administrator, who in turn transmits it to the Credentials Committee. The Credentials Committee considers the application and then makes a recommendation of acceptance or denial to the Medical Council of the Medical Staff. The Medical Council in turn considers the recommendation of the Credentials Committee and makes a recommendation to the Board of Trustees which is empowered with the final authority on the application. In case of rejection, the applicant may avail himself of the opportunity of appearing and stating his case before the Joint Conference Committee, if he desires. (A copy of that portion of the By-laws in effect at the time of Dr. Barrett's application pertinent to an application for appointment to the staff is annexed to these papers as EXHIBIT B.)

Dr. Barrett submitted his application and was interviewed by Dr. David Wilson, Director of Surgery, at the request of the Credentials Committee. His application was then forwarded to the Credentials Committee. The Credentials Committee reviewed

the application and sometime in late June of 1971 advised Dr. Barrett that they could not act upon the application until they received further information which they requested Dr. Barrett to provide as soon as possible. A portion of the requested information was not supplied by Dr. Barrett until October, and the remainder was never supplied. Thereafter on November 3, 1971, the Credentials Committee met to formally consider Dr. Barrett's application. After due consideration, the Credentials Committee voted unanimously not to recommend Dr. Barrett for staff privileges at the United Hospital. (A copy of the minutes of the Credentials Committee meeting of November 3, 1971, is annexed to these papers as EXHIBIT C.)

On December 14, 1971, the Medical Council of the Medical Staff of United Hospital met to consider plaintiff's application for staff privileges. After considering the recommendation of the Credentials Committee, the Medical Council also determined not to recommend Dr. Barrett for staff privileges. (A copy of the minutes of the meeting of the Medical Council of the December 14, 1971, is annexed to these papers as EXHIBIT D.)

On January 4, 1972, the Executive Committee of the Board of Trustees met to consider Dr. Barrett's application for staff privileges. After due consideration of this matter and the recommendations of the Credentials Committee and the Medical Council, the Executive Committee decided not to recommend appointment of Dr. Barrett to the staff. (A copy of the minutes of the Executive Committee meeting of January 4, 1972, is annexed to these papers as EXHIBIT E.)

Thereafter, the Board of Trustees of United Hospital acting upon the recommendations of the Credentials Committee, Medical Council, and Executive Committee of the Board of Trustees, and upon due consideration, denied Dr. Barrett's application for Medical Staff privileges. Dr. Barrett was advised that his privileges were denied by letter from Mr. Stolnacke dated January 17, 1972. (A copy of this letter is annexed to these papers as EXHIBIT F.)

Thereafter on January 24, 1972, Dr. Barrett requested a hearing before the Joint Conference Committee in accordance with the By-law provisions as aforementioned. On February 10, 1972, a letter was forwarded to Dr. Barrett advising him of the specific reasons for his denial of staff privileges. (A copy of this letter is annexed to these papers as EXHIBIT G.)

The hearing was held before the Joint Conference Committee on February 16, 1972. Dr. Barrett was present and was represented by his present counsel. At this hearing, Dr. Barrett was afforded the opportunity to state his case for appointment to the Medical Staff. (A copy of the transcript of the hearing before the Joint Conference Committee held on February 16, 1972, is annexed to plaintiff's complaint already filed with this Court as Exhibit D.) At the conclusion of the hearing, Dr. Barrett was given the opportunity to request a further hearing or submit further materials in support of his position.

On March 27, 1972, the Joint Conference Committee convened for the purpose of considering the results of the hearing held on February 16, 1972. Having noted that Dr. Barrett made no request for a further hearing and submitted no further materials on his behalf, the hearing was deemed closed, and,

after due consideration, the prior actions of the Credentials Committee, Medical Council, and Board of Trustees with respect to Dr. Barrett's application were confirmed, and a recommendation that Dr. Barrett be denied staff privileges was forwarded to the Executive Committee of the Board of Trustees. (A copy of the minutes of the meeting of the Joint Conference Committee of March 27, 1972, is annexed to these papers as EXHIBIT H.)

On April 17, 1972, the Executive Committee of the Board of Trustees approved the recommendation of the Joint Conference Committee. (A copy of the minutes of the April 17, 1972, meeting of the Executive Committee of the Board of Trustees is annexed to these papers as EXHIBIT I.) This recommendation of the Executive Committee was affirmed by the Board of Trustees at their next regular meeting and on May 3, 1973, Dr. Barrett was advised by the Executive Director that his application had been denied. (A copy of Mr. Stolnacke's letter of May 3, 1972, is annexed to these papers as EXHIBIT J.)

Thereafter, in May of 1973, this lawsuit was instituted against the various defendants named in the caption. The majority of these defendants are the persons who sat on the various committees which considered Dr. Barrett's application as aforementioned. With respect to the doctors on whose behalf I am submitting this affidavit, I am advised that none was served with process in this action prior to May 15, 1973.

5. The United Hospital is a private, self-governed, nonprofit organization incorporated under the laws of the State of New York. As with any hospital located within this State, United Hospital is subject to intricate State regulation and

inspection pursuant to the New York Public Health Law. In the past, United Hospital has availed itself of Hill-Burton funds in the construction of a new wing and, of course, participates in the Medicare and Medicaid programs.

6. However, the management of the internal affairs of the Hospital is solely the responsibility of the Hospital and its staff. The Trustees, officers, and members of the various governing committees are either doctors on the staff or prominent members of the local community. The State is in no way connected with the management of the internal affairs of the Hospital. The appointment of physicians to the staff is purely the private domain of the Hospital and its internal governing body. The State does not encourage, promote, support, or associate itself in any way with the Hospital's rules and methods for selecting physicians for the staff. The State does not pass upon or approve the By-laws relating to appointments to the staff.

7. Since the matter of Dr. Barrett's denial of privileges to the Medical Staff is a private Hospital matter not subject to State or Federal involvement, it is most respectfully submitted that the complaint does not state a cause of action and this Court has no subject matter jurisdiction over this action. I am advised by my attorneys that in the case of Mulvihill v. Butterfield Memorial Hospital, 329 F. Supp. 1020 (1970), cited in the accompanying Memorandum of Law, this Court on facts remarkably similar to the present action decided that there was no Federal Court jurisdiction in the matter.

8. I am further advised by my attorneys that New York Courts uniformly will not interfere with the decisions of

private hospitals regarding the appointment of staff members as long as the rules and regulations of the Hospital regarding such appointments are followed. With respect to Dr. Barrett's application, the By-laws and regulations of the Hospital were scrupulously followed. The Doctor's application was conscientiously reviewed by each committee charged with that responsibility, and each committee, after independent review, recommended he be denied staff privileges. Having presided over one such meeting myself, I must state that as far as I could observe each defendant acted in good faith and with only the best interests of United Hospital in mind. The transcripts and minutes of the various meetings at which Dr. Barrett's application were discussed are themselves adequate indicia that the decision to deny Dr. Barrett's admission to the Medical Staff was made only after serious consideration by all those charged with reviewing applications for staff privileges.

9. As Mr. Stalnacke stated in Paragraph 5 of his affidavit submitted in support of co-defendant's motions, the By-laws in effect at the time of Dr. Barrett's application relating to appointment of doctors to the Medical Staff met with the then existing standards of the Joint Commission on Accreditation of Hospitals. Since the By-law requirements were followed in Dr. Barrett's case, it is most respectfully submitted that the discretionary decision of the Hospital not to appoint Dr. Barrett to its staff is not subject to judicial review. In any event, it is unfathomable to me that all of the persons (noted and respected doctors and members of the community, I might add)

who reviewed Dr. Barrett's application as members of the various committees abused their discretion in this regard. Surely, the Hospital is allowed some discretion in determining appointments to the staff. Not everyone who holds a medical license is automatically entitled to staff privileges. The appointment of any doctor to the staff is a matter requiring serious consideration by the Hospital. In all situations, the best interests of the Hospital are paramount. The minutes of the Credentials Committee meeting and the letter of Mrs. Poole dated February 10, 1972, indicate the matters which concerned the Hospital with respect to Dr. Barrett's application. His application was given every consideration. I submit that no fault can be found with the Hospital in denying his application in view of the circumstances presented.

10. It appears that the major thrust of Dr. Barrett's action is to require the United Hospital to grant him privileges to its Medical Staff. I am advised by my attorneys that under State Law such a mandamus proceeding must be instituted within four months of the decision which is the matter in dispute. This action, however, was not instituted until more than one year from Mr. Stalnacke's letter advising Dr. Barrett that the Hospital had finally determined to deny him staff privileges. Clearly, this action was not instituted within the time required by New York Law, nor even within a reasonable time thereafter.

11. In sum, it is respectfully submitted that this matter is not a subject of Federal Court concern, nor is there any merit whatsoever to plaintiff's claims. Dr. Barrett

received full and fair consideration of his application in accordance with the Hospital By-laws and it was denied for fair and just reasons. If the voluntary members of the governing bodies of private self-governing institutions must fear extended litigation and possible financial consequences every time they deny staff privileges to a doctor, such volunteers will become few and far between, and the private self-governing hospitals will become a thing of the past.

Wherefore, your deponent respectfully requests an order of this Court dismissing the complaint on the grounds that this Court lacks subject matter jurisdiction, the complaint fails to state a cause of action, and that the claims of the plaintiff are barred by the Statute of Limitations. It is further requested that the defendants herein be granted such other and further relief as may seem just and equitable to this Court including costs of this proceeding.

S/
CHARLES J. ALEXANDER, M.D.

Sworn to before me this
29th day of June, 1973.

S/
LAWRENCE T. D'ALONSO, JR.
Notary Public, State of New York
No. 66-5904805
Qualified in Westchester County
Term Expires March 30, 1977

C 203—Stipulation Extending Time To Answer. ✓

JULIUS BLUMBERG, INC., LAW BLANK PUBLISHERS
80 E 4TH FLOOR PLACE AT BROADWAY, NEW YORKUNITED STATES ~~COUNTY~~ DISTRICT COURT
~~SOUTHERN~~ SOUTHERN DISTRICT

WILLIAM A. BARRETT, M.D.,

Plaintiff

against

UNITED HOSPITAL; RICHARD A. STOLNACKE,
Executive Director of United Hospital,
individually and in his official capacity;
et al.,

Defendant s

Index No. 73 CIV 1716

Judge Arnold Bauman

STIPULATION EXTENDING
TIME TO ANSWERas underlined on the
attached sheet

IT IS HEREBY STIPULATED that the time for the defendant/ to appear and to answer, amend
or supplement the answer as of course or to make any motion with relation to the summons or to the com-
plaint in this action, be and the same hereby is extended to and including the first
day of July, 1973.

Dated: June 15, 1973

Print Name Beneath Signature

LEVY, GUTMAN, GOLDBERG & KAPLAN

Attorney(s) for Plaintiff

363 7th Avenue
New York, New York

EXHIBIT "A"

135A

ARTICLE III

APPOINTMENT TO THE MEDICAL STAFF

Section A - Qualifications: To be eligible for appointment to the Medical Staff, an applicant must be a graduate of a Medical School approved by the American Medical Association; must be licensed to practice in the State in which he resides; must be qualified for membership in his local Medical Society; and must have his main office within the service area of the Hospital.

Section B - Ethics: Each applicant for appointment to the Medical Staff shall sign the following pledge: "As a condition to my appointment to the Medical and Dental Staff of United Hospital, I promise to abide by its By-Laws and Rules and Regulations and to conduct myself in an ethical manner according to the Principles of Ethics of the American Medical Association. I also promise to refrain from the practice of paying another physician, either directly or indirectly, any part of the fee received for professional services".

Section C - Term of Appointment: Appointment and reappointment to the Medical Staff shall be for a term of one year or, in the case of an interim appointment, to the end of the then current Hospital year.

Section D - Procedure for Initial Appointment: Applications for initial appointment to the Medical Staff shall be presented in writing on the prescribed form and shall set forth the qualifications and recommendations of the applicant as well as the pledge required by Section B of this Article. The application shall be submitted to the Administrator, who will transmit it to the Credentials Committee. The Credentials Committee shall meet with the applicant for the purpose of assessing his qualifications and characteristics and acquainting him with the situation pertaining to his professional opportunities in the community. The Chairman will report to the Medical Council the findings and recommendations of the Credentials Committee which shall be made as soon as possible but not later than three months following receipt of the application. If a recommendation or deferral is made by the Credentials Committee, it shall be followed by a later recommendation to accept or reject the application at the next monthly meeting of the Medical Council. Following receipt of the final recommendation of the Credentials Committee, the Medical Council shall promptly submit to the Trustees

EXHIBIT B

its recommendation with respect to the application, such submission to be made by the Chief of Staff. The Administrator will notify the applicant of the action taken by the Trustees.

Section E - Procedure for Re-appointment: The Medical Council shall annually submit to the Trustees recommendations for re-appointments to the Medical Staff in sufficient time to permit the Trustees to make such appointments prior to the beginning of the next Hospital year.

Section F - Nature of Appointment: All appointments and re-appointments to the Medical Staff shall include a designation of the Staff category; grade of Service; Division of Service; and type of privileges for which the appointment is made, said privileges to be determined as provided in Article VII hereof.

Section G - Appeals: In cases of rejection of an application for appointment or non-renewal or cancellation of an appointment, the applicant shall be afforded the opportunity of appearing and stating his case before the Joint Conference Committee, the members of which will thereafter make their respective recommendations to the Trustees and to the Medical Council as the case may be.

Section H - Emergency Appointment: In cases in which the life of a patient is in immediate danger and in which delay in administering treatment might increase such danger, the Administrator after conference with the Chief of Staff, has the authority to make an appointment to the Medical Staff providing temporary privileges for the Attending physician or for a Consultant. In any such case the Chief of Staff shall give an authoritative opinion as to the competence and ethical standing of the physician so appointed and in the exercise of such temporary privileges he shall be under the direct supervision of the Chief of Staff. Emergency appointments will not be granted to attend more than four patients in any one year and after this number of appointments the physician will be required to receive a regular appointment to the Medical Staff before being allowed to attend additional patients in the Hospital.

Section I - Retirement Age: No physician shall be eligible for appointment or re-appointment to the Attending Staff if his age is 65 years or over. This provision shall not apply to the Honorary category of the Medical Staff.

MINUTES OF A MEETING OF
THE CREDENTIALS COMMITTEE

137A

NOVEMBER 3, 1971

The Chairman of the Credentials Committee, Dr. Alfred Grant presided, calling the meeting to order at 4:15 p.m.

Present were: Dr. Samuel Drago
Dr. Philip Jensen
Dr. Shelby Lever
Dr. Harold Roth
Dr. Jacob Shragowitz

Mrs. Barbara Poole (Secretary)

The Chairman stated that the purpose of the special meeting was to discuss the matter of Dr. William Barrett and his application for membership in the Medical Staff of United Hospital.

As background information to the meeting, the Chairman reviewed the file of the applicant.

A registered return-receipt requested letter was forwarded to the Executive Director of United Hospital on February 10, 1971 announcing Dr. Barrett's intention to reopen his office in Mamaroneck on July 1, 1971 and requesting application to resume surgical privileges at United Hospital as of that date.

The Executive Director sent an application form to Dr. Barrett informing him of hospital procedure whereby the application would be considered by the Credentials Committee which would make its recommendation to the Medical Council. Medical Council would, in turn, direct its recommendation to the Board of Trustees for consideration and action.

The Chairman of the Credentials Committee acknowledged to Dr. Barrett the forwarding of an application and instructed him to contact Dr. David A. W. Wilson, Director of Surgery, for an interview.

The doctor's application was sent directly to the Executive Director. A copy was submitted to Dr. Wilson at the time of the interview.

EXHIBIT C

by the Director of Surgery indicated that an interview had been conducted on March 19, 1971. Dr. Barrett's reasons for applying for privileges at United Hospital were discussed at that time. Since he intended to return to Mamaroneck where he claimed he enjoyed a considerable following it would be necessary that there be a hospital in which he could practice and refer patients. The Director of Surgery advised Dr. Barrett that if his application was approved he would be on probation and under supervision. He requested a list of major surgical procedures performed at the New Milford, Connecticut, Hospital, the institution in which Dr. Barrett was presently enjoying privileges. The Director of Surgery further indicated in his report personal observations of Dr. Barrett's character and recommended careful consideration of the application.

The application indicated that Dr. Barrett received his medical degree from Syracuse Medical College, did his internship at United Hospital in 1940/41 and was licensed in the State of New York in 1942. He enjoyed a rotating residency at United in 1941/42 and a surgical residency at Brooklyn Veterans in 1954/56. He is a fellow in the American College of Surgeons. The application was requesting general surgical privileges, excluding GU, and membership on the Courtesy Staff beginning July 1, 1971. As an addendum to his application, Dr. Barrett indicated that his New York State license had been revoked on April 14, 1969 after pleading guilty to a misdemeanor with an original charge of abortion which resulted in his staff appointment at United not being renewed in 1969. His New York State license was to be restored July 1, 1971 with no probation period. In making application for appointment to the medical staff of United Hospital, Dr. Barrett agreed to abide by its laws and by such rules and regulations as it may from time to time enact. He specifically pledged that he would not receive from or pay to another physician either directly or indirectly any part of a fee received for professional services and he indicated full understanding that any significant misstatements in/or omission from his application would constitute cause for dismissal from the Staff. Dr. Barrett gave as references the names of Drs. Arthur Diedrick and Francis J. Murphy.

Further to background, the Chairman stated that Dr. Barrett had been charged/performing abortions on two girls in September of 1966. In June of 1968 he was permitted to plead guilty to a reduced charge of simple assault. He received a suspended sentence by a Westchester Court and had his license to practice revoked by the State Board

of Regents following recommendations by its discipline committee and its medical grievance committee. As a result, he applied and was given leave of absence from United Hospital and his appointment was never renewed. The Director of Surgery indicated that following his interview with Dr. Barrett he reviewed the surgical activity of the physician for the year preceeding his leaving the Hospital staff since the physician had indicated a yearly average of 240 major and 750 minor operations. It was revealed that the total more closely approximated 80 major cases and 53 minor cases, excluding GYN.

The Credentials Committee Chairman then read excerpts from two letters of recommendation on behalf of Dr. Barrett written by Saul H. Slone, Administrator of New Milford Hospital and Norris A. Wildman, President of New Milford Hospital. Mr. Slone attested to Dr. Barrett's integrity, intelligence and good character, his high degree of competence in cases of surgery performed at New Milford Hospital and commendation for his patient care. Mr. Wildman indicated that he had known Dr. Barrett on both a social and professional basis and considered him a valuable member of the hospital staff and a valued employee in the Emergency Room. He noted that the doctor's work had been exemplary and conscientious.

The Credentials Committee Chairman revealed that Dr. Barrett next wrote to the Executive Director on May 28, 1971 asking that an early reply be returned to him concerning a decision in his behalf since the July 1st date of his office reopening was fast approaching. The Executive Director replied on June 2nd and indicated he would discuss Dr. Barrett's inquiry with the Chief of Staff. He again wrote to Dr. Barrett on June 11th telling the doctor that he should be hearing from either Dr. Grant as Chairman of the Credentials Committee or Dr. Alexander concerning the processing of his application within the next few days.

The Chairman of the Credentials Committee wrote to Dr. Barrett on June 28th advising the doctor that his application for staff privileges was lacking in certain essential information and asking the doctor to submit that information at his earliest convenience. For proper evaluation of the application, it was essential that Dr. Barrett submit proof of current valid New York State license to practice medicine, proof of current valid professional liability insurance in the State of New York, and information concerning current status in the County and State

Medical Society. In reply to Dr. Barrett's request concerning a decision on the application, the Chairman advised that no final decision would be forthcoming until the early part of October of 1971. He asked the doctor to contact him if there were any questions regarding the matter.

Dr. Barrett replied to Dr. Grant's request on October 1, 1971 providing a photocopy of order #524 dated January 27, 1971 from the University of the State of New York which was proof of current valid license of New York State to practice medicine and proof of current valid professional liability insurance in the State of New York. Membership in the County and State Medical Society is no longer a requirement.

On October 1, 1971 Dr. Barrett requested of the Executive Director a copy of the bylaws of the medical staff of United Hospital. He had been in conversation with Dr. Diedrick who had told him that the bylaws were being revised by Dr. Gundy and the bylaw committee. Dr. Diedrick had offered to send to Dr. Barrett a copy which had never arrived and he was therefore requesting same of the Executive Director. The Executive Director complied with Dr. Barrett's request and a copy of the present Medical Staff bylaws was forwarded to the doctor on October 19th.

This concluded all available correspondence which could be considered for review by the Chairman of the Credentials Committee and conversational review was encouraged by the Chairman at this point.

Credentials Committee is left with a situation whereby an applicant has applied for reinstatement on the Medical Staff, said applicant previously practicing at United Hospital but who had been found guilty of an assault charge and whose license had been temporarily revoked by the State of New York. A letter in file attests that a leave of absence had been granted.

Dr. Drago theorized the situation as it would relate to a brand new applicant and not an applicant who had previously been a member of this medical staff. He questioned the concern which would be evidenced if the committee were considering a newcomer to the service area who had had a revoked license, who had lied on his application or whose credentials were less than those of other new men and who had been guilty of assault referable to an act of medical nature.

The subject of Dr. Barrett's livelihood was presented as a measure of deliberation. It was pointed out that Dr. Barrett enjoyed privileges at Cross County Hospital. His privileges were pending at St. Agnes Hospital. It was further pointed out that the State of Connecticut had in Dr. Barrett's own words "given him a warm welcome". Denial of privileges at United Hospital did not preclude the doctor from earning a living.

It was further determined that the Credentials Committee would sustain the position not to interview Dr. Barrett personally since Dr. Wilson had done so at the Committee's request.

In conclusion it was agreed that the applicant had not provided surgical information from New Milford Hospital, that vast discrepancies existed between the applicant's statements and operating room records, that the applicant had been indicted for the charge of abortion and pleaded guilty to a lesser charge of assault by his own admission, that it was determined that the applicant retain characteristic bordering on arrogance as attested to by the Chief of Surgery following a personal interview with the applicant. That while the committee understood it was not their position to become involved with character only, their job was to determine whether or not they wished to professionally associate both themselves and the Hospital with a man of this caliber, and finally through a thorough evaluation of both past and current correspondence, by a report of personal interview, it was the consensus of the Credentials Committee not to reflect discredit on the medical community and the image in the Hospital by the recommendation of this applicant for membership on the medical staff. It was not the desire of the members of the Credential Committee to associate themselves with a physician who was medically and ethically irresponsible, an acknowledged criminal or an individual who could cause disbelief in the accuracy or the authority of programs of peer review and audit currently being established by the medical staff and administration of the Hospital. Dr. Grant called for a vote of the committee and the committee was unanimous in their decision not to recommend the applicant for staff privileges at United Hospital.

UNITED HOSPITAL
PORT CHESTER, NEW YORK

MEDICAL COUNCIL MEETING
December 14, 1971

Meeting:

The monthly meeting of the Medical Council of the Medical Staff of United Hospital was held on Tuesday, December 14, 1971 at 4:p.m. in the Swift Auditorium.

Prior to the meeting Dr. Silberstein introduced Mrs. Viola Nelson who spoke on the establishment of the "Hot Line". Mrs. Nelson requested more volunteers to handle phone calls.

Attendance:

Dr. Charles Alexander, Chief of Staff presided and the following members were in attendance:

Dr. Anthony Balchunas	Dr. Edwin Kaufman
Dr. Leo Delaney	Dr. Herman Scheps
Mrs. Edna Delzio	Dr. Joel Schwartzman
Dr. Samuel Drago	Dr. H. Eugene Seano
Dr. William Felch	Dr. Joseph Silberstein
Dr. Alfred Grant	Mr. Richard Stolnac
Dr. Abraham Halpern	Dr. David A. Wilson
Dr. Engel Hevenor	

From the Staff:
C. Jonathan Shattuck
Patricia Ramirez

Correspondence:

Dr. Alexander read a letter from Dr. Arthur S. a podiatrist, who requested that podiatrists be granted privileges on the Medical Staff. It was decided that Drs. Wilson, Grant, and Alexander will meet with several podiatrists to determine the extent of privileges they are requesting. A report will be made to the next meeting of the Medical Council.

Committee Reports:

Credentials Committee: Dr. Grant reported that at the last meeting of this Committee the applications of several physicians were reviewed and he presented the following recommendations to the Medical Council:

Paul Rutkowski, M.D. - Associate Staff with privileges in Ophthalmology

Leonard Finkelstein, M.D. - Associate Staff with privileges in Internal Medicine.

EXHIBIT "B"

continued

EXHIBIT D

William Barrett, M.D. - Application denied because his credentials did not meet the standards of the Credentials Committee at time.

On a motion duly made and seconded, these recommendations were approved for forwarding to the Board of Trustees.

Utilization Review: Dr. Scheps stated that Medicaid requires medical certification on patients who stay beyond 21 days in the Hospital, for review by Medicaid officials.

Medical Records: There was no report on the Committee, but Dr. Halpern asked that a psychiatrist be appointed to the Committee. Dr. Alexander will appoint one.

Infection Committee: Dr. Silberstein reported that evaluation of Hospital sanitation was being discussed at Committee meetings. He asked that Directors of Services let him know how they wish their isolation cases handled. The infection control manual presently in use is being revised.

Ad Hoc Committee on Inhalation Therapy: Dr. Delaney reported on items discussed at the last meeting of this Committee, namely: the appointment of Dr. Paglia as director of the department; what fees are to be charged and how they are to be handled; what compensation of Dr. Paglia, and finally the possibility of dissolving the present Committee and naming a smaller committee, such Committee to include Dr. Paglia. After discussion a motion was made seconded and passed to dissolve the present Committee and to name a smaller one.

Medical Staff Changes:

Dr. Alexander read letters of resignation from Dr. Wilfred Wingeback - Consultant - Neurosurgery
Dr. Allyn Ley - Consultant - Hematology

Dr. Kaufman recommended that Dr. Jerry Edelman be advanced from Associate Attending to Attending Physician in Medicine.

These resignations and promotion were accepted by the Medical Council for forwarding to the Board of Trustees.

Medical Council continued- Dec. 14, 1971 meeting

Report of the Chief:
of Staff

Dr. Alexander had no report to make, but he suggested that anyone who had items he wished to have on the agenda for Medical Council see Mrs. Ramirez prior to the day of the meetings.

Report of Executive

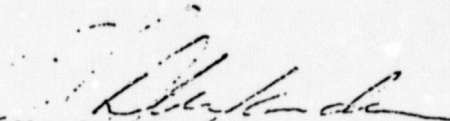
Mr. Stolnacke reported that the Long Range Planning Committee would be expanded to include several members of the Medical Staff and Board of Managers.

The Board of Trustees authorized the hiring of the consulting firm of Cresap, McCormick and Paget to conduct a survey in conjunction with the Long Range Planning. These consultants will meet with members of the Medical Staff the next few months and their survey is expected to be completed by April, 1972.

Old Business:

Dr. Halpern speaking for his colleagues in the Department of Psychiatry, expressed dissatisfaction with correspondence related to the recent annual appointment letter and request for proof of malpractice insurance. Dr. Halpern was informed that this matter was being reviewed and revised.

There being no further business the meeting adjourned at 5:00 p.m.


Charles J. Alexander, M.D.
Chief of Staff

EXECUTIVE COMMITTEE
January -, 1972

A special session of the Executive Committee of United Hospital was called for the evening of January 4, 1972. Charles R. C. Steers presided.

Attendance:

Richard W. Dammann
Frank M. Donahue
Jack Gantz
David E. Gile
H. Clay Johnson
Mrs. Thomas H. Lane
Lawrence Marx, Jr.
Mrs. Emil Mosbacher, Jr.
Richard A. Stolnacke

Staff:

Russell A. Arant
John O. Parker
Mrs. Barbara Poole
C. Jonathan Shattuck
Gary N. Wiessen

Guest:

Lawrence Bassett

- I. The chairman explained that Organization Resources Counselors and Administration had recommended that the wage and salary program be increased the maximum of the limit permitted under Phase II of the federal Wage & Salary guidelines.

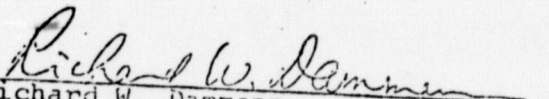
The chairman explained that the presently proposed increase was envisioned in the 1970-71 operating budget and was scheduled for implementation on August 22, 1971. President Nixon's announcement of the wage and price freeze on August 15, however, deterred such implementation. The chairman introduced Mr. Lawrence Bassett of Organization Resources Counselors to review present conditions at United and neighboring hospitals regarding wage and salary programs. Mr. Bassett expressed urgency in the implementation of United Hospital's deferred program as outlined in his letter of December 13, 1971 to the Director of Personnel. A copy of this letter is attached to these minutes.

Mr. Bassett stressed that the new scales were on the conservative side and might require revision in mid 1972 as the labor market stabilizes and union negotiating patterns develop. He further informed the committee that by implementing the new wage and salary program United Hospital would be initiating performance standards set by supervisory personnel based upon objectives set by management.

The Director of Financial Services submitted a report with conservative projections of increases and the reimbursement rate, the effect of a 6% increase in room rates and other potential sources of cash involving cost containment credit collection procedures. A copy of Mr. Arant's report is attached. This report revealed that the Hospital expects an increase in case in 1972 in the amount of \$528,500 which offsets the cost of the new wage and salary program which is estimated to be \$363,376.

Upon motion made and seconded and unanimously passed, the proposed wage and salary program was approved to be implemented in accordance with the economic stabilization guidelines.

- II. The Executive Committee, after due consideration of the recommendations of the Credentials Committee and of the Medical Council, denied the application of William Barrett, M.D. for Medical Staff privileges at the hospital.


Richard W. Dammann

January 17, 1972

William A. Barrett, M.D.
1110 1st Ave.
Brooklyn, New York 11213

Dear Dr. Barrett:

After due consideration of the recommendations of the Credentials Committee and the Medical Council, the Board of Trustees of United Hospital has denied your application for medical staff privileges.

If you wish to present your position in regard to the denial of your application, you may request a hearing before the Joint Conference Committee. Such hearing will be held within 30 days after your request is received providing such request is forthcoming within 10 days of the date of this letter.

In the event we do not receive your request to appear before the Joint Conference Committee within 10 days from the date of this letter, we will assume that you have accepted the Board's decision and do not desire to pursue this matter further.

Very truly yours,

Richard A. Stelmacke
Executive Director

RAS/DA

EXHIBIT F

January 10, 1972

William A. Bennett, M.D.,
210 Chaplin Avenue
Baltimore, Md. 21201

Dear Dr. Bennett:

In accordance with your letter of January 24, 1972 received by this office on January 26th, you are advised that a hearing before the Joint Conference Committee of the Hospital will be held on Wednesday, February 16, 1972 at 8:00 p.m. in Shift Auditorium for you to present your position and testimony in regard to the denial of your application for medical staff privileges.

The hearing will be conducted on an informal basis in order to permit full disclosure without regard to strict procedural rules.

At the conclusion of the hearing the Joint Conference Committee will consider all matters presented and will, within 15 days of such hearing, indicate its recommendations to the Board of Trustees who will, as soon as possible thereafter, notify you of its decision. In view of the fact that you are presenting your case, the following is a summary of the considerations which led to the denial of your application:

Your application for privileges at the Hospital was denied because of your failure to provide requested surgical information from New Hillford Hospital; vast discrepancies between statements on your application and Operating Room records of United Hospital; vast charges of abortion for which you were indicted and for which you pleaded guilty; and the negative testimony and general adverse comments by members of the medical staff of the Hospital regarding your conduct and activities in the medical field.

William A. Barnett, H.P.

-2-

If you have any questions with regard to the above,
please feel free to contact the undersigned. If, for
any reason, you are unable to attend the hearing on
the date indicated above, at least three days notice
should be given so that all interested parties can be
timely notified.

Very truly yours,

Barbara Poole (H.P.)
Assistant Secretary
Board of Trustees

UNITED HOSPITAL
Port Chester, N.Y.

JOINT CONFERENCE COMMITTEE

The Joint Conference Committee reconvened on Monday, March 27, 1972 at 5:30 p.m. in the Administrative Conference Room for the purpose of concluding the matter of Dr. Barrett's appeal concerning the denial of medical staff privileges. Richard W. Dammann, Chairman, presided.

Attendance:

Charles J. Alexander, M.D.
Anthony Balchunas, M.D.
H. Clay Johnson
Edwin Kaufman, M.D.
Mrs. Thomas Lane
Eugene Seanor, M.D.
Richard A. Stolnacke
David A. W. Wilson, M.D.

From the Staff:

Mrs. Barbara Poole
Robert A. Wild, Esq.

The statistics pertaining to operations performed by Dr. Barrett for the years 1963 through 1966, as requested by Dr. Barrett on February 16, 1972, were forwarded to Dr. Barrett and his counsel. Since no request was forthcoming from Dr. Barrett that another meeting be scheduled at which additional material pertinent to his application would be presented, the hearing was automatically closed on March 17, 1972.

It was unanimously concluded that the prior actions of the Credentials Committee, the Medical Council and the Executive Committee be affirmed. This recommendation will be forwarded to the Executive Committee for prompt action.

Richard W. Dammann
Richard W. Dammann, Chairman

UNITED HOSPITAL
Port Chester, New York

EXECUTIVE COMMITTEE
April 17, 1972

A special meeting of the Executive Committee was held on Monday, April 17, 1972 at 8:00 P. M. in Swift Auditorium. The Chairman, Charles R. C. Steers, presided.

Attendance: Paul Adler
Charles J. Alexander, M.D.
Richard W. Dammann
David E. Gile
Jack Gantz
George Haley
Mrs. Harvey Kelsey, Jr.
Mrs. Thomas Lane
Anthony J. Posillipo
William M. Rees
James A. Sudbay, M.D.

Staff: Calvin H. Douglas
John Owen
Mrs. Barbara Poole
C. Jonathan Shattuck

The purpose of the special meeting was twofold: to act upon the recommendation of the Joint Conference Committee that the application of Dr. William A. Barrett for medical staff privileges at United Hospital be denied; to act upon the recommendation of the Finance Committee that the Rowena Lee Teagle School of Nursing be closed.

The Chairman of the Joint Conference Committee reviewed in detail the facts pertaining to the denial of Dr. Barrett's application as recommended by the Credentials Committee on November 3, 1971, the Medical Council on December 14, 1971, and the Executive Committee on January 3, 1972. Dr. Barrett was notified of this decision on January 17, 1972.

In keeping with the bylaws of the medical staff, Dr. Barrett was permitted to request an informal hearing before the Joint Conference Committee to present testimony pursuant to the denial of staff privileges. This request was honored by a meeting of the Committee on February 16, 1972. Dr. Barrett and his counsel requested additional statistics pertaining to operations at United

Executive Committee
April 17, 1972

-2-

Hospital between the years 1963 and 1965.

The hearing was adjourned but held open to permit a summary of statistical information to be forwarded to Dr. Barrett on February 25, 1972. Dr. Barrett was also advised that if he wished to respond in regard to this additional information, notice should be given within seven days, or March 3, 1972. Subsequently, the transcript of the proceedings of February 16, 1972 was forwarded to Dr. Barrett's counsel and the seven day period extended to March 10.

Dr. Barrett was notified by the Assistant Secretary of the Board of Trustees on March 16, 1972 that since no request for a further hearing had been forthcoming, the Joint Conference Committee considered the matter closed, would convene promptly to consider the material presented earlier, and make its recommendation to the Board of Trustees or its Executive Committee as soon thereafter as practicable.

The Joint Conference Committee convened on March 27, 1972. It was unanimously concluded that the prior actions of the Credentials Committee, the Medical Council and the Executive Committee be affirmed. The recommendation was to be presented to the Executive Committee as promptly as possible.

The Chairman of the Joint Conference Committee further reviewed with the members of the Executive Committee pertinent background material, thoroughly clarifying and responding to all questions.

Upon motion made by James A. Sudbay, M.D. and seconded by George Haley, the recommendation not to appoint Dr. William A. Barrett to the medical staff of United Hospital was unanimously approved.

The second item of business to come before the Committee was the consideration and recommendation of the Finance Committee on April 10, 1972 that the Rowena Lee Teagle School of Nursing of United Hospital be closed as soon as practicable.

The Chairman reviewed earlier recommendations by the Consultants of Cresap, McCormick & Paget in January 1970. Since the School of Nursing is presently operated at an annual loss of \$150,000, it was deemed financially judicious to expedite this decision.

A summary of actions which would be undertaken relative to the phasing out of the School was distributed and discussed and is attached to these minutes.

Executive Committee
April 17, 1972

-3-

The Committee suggested that the President contact the Teagle Foundation as promptly as possible to discuss this action.

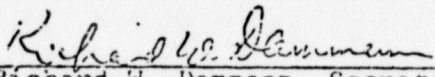
The Chief of Staff indicated that the Medical Staff will be generally supportive of this decision. Board of Manager members of the Executive Committee concurred.

A motion was made by Richard W. Dammann and seconded by Anthony J. Posillipo that the School of Nursing be closed with the graduation of the current undergraduate class, and that assistance be offered to each present student and those accepted for the Fall of 1972 in the matter of transfers and enrollment in other schools. The motion was unanimously carried.

A resolution was passed recommending that the Chairman of the School of Nursing Advisory Committee consider not holding the Ziter piano concert in light of actions that have been taken by the Executive Committee to close the School of Nursing.

The items listed in the summary of phasing out actions were reviewed and approved. A press release will be prepared by the Community Relations Department for review by the President and Chairman of the Executive Committee prior to distribution to the media for April 21 dissemination.

There was no further discussion of the two items before the Executive Committee, and the meeting adjourned at 10:15 P.M.


Richard W. Dammann, Secretary

May 3, 1972

William A. Barrett, M.D.
310 Claflin Avenue
Bamaronock, New York 10543

Dear Dr. Barrett:

After due consideration of the recommendations of the Credentials Committee and the Medical Council and after consideration of the recommendations of the Joint Conference Committee and the proceedings had before such Committee, United Hospital has denied your application for medical staff privileges.

Very truly yours,

Richard A. Stolnacke
Executive Director

RAS/bp

cc: Jeremiah Gutman, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

WILLIAM A. BARRETT, M.D.,

Plaintiff,

73 Civ. 1716

JUDGE BAUMAN

- against -

UNITED HOSPITAL, et al.,

Defendants.

AFFIDAVIT IN SUPPORT OF
DEFENDANTS' MOTION TO
DISMISS OR FOR SUMMARY
JUDGMENT

----- x

STATE OF NEW YORK

)

ss:

COUNTY OF WESTCHESTER

)

LAWRENCE T. D'ALOISE, JR., being duly sworn, deposes
and says:

1. I am an attorney associated with the firm of
Clark, Gagliardi & Miller, attorneys for defendants GRANT,
SUDEAY, WASSERMAN, KAUFMAN, ALEXANDER, BALCHUNAS, SEANOR,
DELANEY, FELCH, HALPERN, NESCHIS, SCHWARTZMAN, SILBERSTEIN,
WILSON, DRAGO, Haggerty, JENSEN, LEVER, ROTH, DEE, and
SERAGOWITZ in the above action.

2. This affidavit is submitted in support of the
above named defendants' motion to dismiss plaintiff's complaint
which has been directed by the Honorable Arnold Bauman to be
treated as a motion for summary judgment pursuant to Rule 56 of
the Federal Rules of Civil Procedure.

3. Papers and memoranda of law both in support of,
and in opposition to, defendants' motion have been extensive.
I have received in today's mail plaintiff's further affidavit
in support of its position and statement pursuant to Rule 90,
as well as co-defendants' papers in support of the motion and

supplemental memorandum of law. I might add that the interests of all defendants are one and the same in this motion. In view of the extensive amount of papers already before the Court on defendants' motions, I shall make my remarks as brief as possible.

4. Defendant should be granted summary judgment dismissing plaintiff's complaint. Under the authority of the Mulvihill case cited many times on behalf of the defendants, which case is still the controlling authority in this Circuit, plaintiff's complaint does not state a cause of action. Plaintiff has cited no new authority which would require this Court to do anything other than follow the Mulvihill decision. The actions taken by the defendants as various members of committees considering plaintiff's application for staff privileges were not undertaken "under color of state law", but rather were private actions having to do with a purely private hospital matter, i.e., plaintiff's qualifications for staff membership.

5. In addition, as can be seen from the records of proceedings of the various committees annexed to the moving papers of the defendants on both motions, not only were the By-laws of the hospital with respect to such applications scrupulously followed, but also plaintiff was afforded every opportunity to have a full and fair hearing on his application.

6. In view of the above, it is respectfully submitted that defendants are entitled to dismissal of the complaint with prejudice and summary judgment. No facts sufficient to make out a cause of action for this Court to pass upon have been alleged.

WHEREFORE, it is respectfully requested that defendants' motion to dismiss plaintiff's complaint be granted and that defendants be allowed summary judgment in accordance with Rule 56 of the Federal Rules of Civil Practice and that defendants be granted such other and further relief as may seem just and equitable to this Court.

/s/

LAWRENCE T. D'ALOISE, JR.

Sworn to before me this
sixth day of May, 1974.

/s/

FRANCES ACEO
Notary Public, State of New York
No. 69-0975600
Appointed for Westchester County
Term expires March 30, 1975

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
WILLIAM A. BARRETT, M.D.,

: INDEX NO. 73 Civ. 1716

Plaintiff

: JUDGE BAUMAN

- against -

UNITED HOSPITAL, et al,

: AFFIDAVIT IN SUPPORT OF
: MOTION FOR SUMMARY JUDG-
: MENT

Defendants

:

----- X
STATE OF NEW YORK

)

(ss.:

COUNTY OF NEW YORK

)

RICHARD W. DAMMANN, being duly sworn, deposes and says:

1. I am a member of the Board of Trustees of UNITED HOSPITAL, a defendant herein, and have been a member of its Board for a period in excess of ten (10) years. As a member of the Board of Trustees, I am fully familiar with all the facts and circumstances leading up to the commencement of this action by the plaintiff, WILLIAM A. BARRETT, M.D. As a member of the Board of Trustees of UNITED HOSPITAL at the time of the events leading up to the commencement of the within action, I have been named individually as a defendant in this action as have all other members of the Board at the time in question.

2. Since the date of my graduation from Harvard Law School in 1935, with the exception of the years 1942-1945 when I served in the United States Navy, I have been actively engaged in the practice of law. I am presently a member of the law firm of DAMMANN & HEMING, ESQS., and maintain an office for the practice of law at 380 Madison Avenue, New York, New York, 10017. I am a member of the Association of the Bar of the City of New York and served on its Memorials Committee from 1946 to 1949; its Domestic Relations Court Committee from 1948 through 1951; and its Admissions Committee from 1954 through 1957. I am also a member of the American Bar Association.

3. In addition to serving on the Board of Trustees of UNITED HOSPITAL for the past ten (10) years, I also served on the Board of Trustees of Montefiore Hospital, Bronx, New York, a not-for-profit hospital, from 1965 to 1971. Because of my affiliation with both UNITED HOSPITAL and with Montefiore Hospital I am totally familiar with the issue of granting and/or denying medical staff privileges to physicians. In addition, in my capacity as a practicing attorney, I am also familiar with the realm of litigation involving medical staff privileges and with the various constitutional and civil rights issues which are often raised in litigation of this type and which have been raised in this case.

4. During the time of the events in question, I served not only as a member of the Board of Trustees of the Hospital, but as Chairman of its Joint Conference Committee. The Joint Conference Committee, pursuant to the Bylaws of the Hospital, consists of five (5) trustees, five (5) members of the medical staff, and the Administrator of the Hospital, who acts as the Secretary of the Committee. The Joint Conference Committee acts as a liaison and official point of contact between the Trustees and the medical staff.

5. The medical and dental staff of UNITED HOSPITAL is governed by its Bylaws, Rules and Regulations, which, pursuant to Section 720.1 of the New York State Hospital Code (10 NYCRR 700 et seq.), have been approved by the Board of Trustees of the Hospital. The Bylaws of the medical and dental staff provide that whenever an application for appointment or re-appointment to the medical staff is rejected, or whenever an appointment is cancelled, the aggrieved physician is afforded the opportunity of appealing his case to the Joint Conference Committee, who reviews the denial and makes recommendations to the

Trustees of the Hospital for final determination. When an aggrieved physician appears before the Joint Conference Committee, he is permitted to bring counsel of his choice and to present evidence and testimony with regard to the reasons stated for the denial of appointment to the medical staff. From my personal knowledge of the activities of other not-for-profit hospitals within the State of New York, the procedure outlined above, is generally consistent with the procedure at other not-for-profit hospitals and is the procedure generally recommended and authorized by the Joint Commission on Accreditation of Hospitals, the duly constituted body which audits and recommends accreditation of hospitals. At the time of the plaintiff's application for medical staff privileges, UNITED HOSPITAL was fully accredited by the Joint Commission on Accreditation of Hospitals and that accreditation has continued, uninterrupted or diminished to the present time.

6. As a member of the Board of Trustees of the UNITED HOSPITAL, and a member of its Joint Conference Committee, the committee before whom the plaintiff appeared to give evidence and testimony in rebuttal to UNITED HOSPITAL's reasons for denying medical staff privileges, I am aware that the particular facts leading up to the denial of the plaintiff's application are as follows:

A. The plaintiff was a member of the medical staff of UNITED HOSPITAL for approximately twenty (20) years prior to 1966. In 1966, an indictment was prepared by the Westchester County Grand Jury charging the plaintiff with two (2) counts of criminal abortion in violation of the then Section 125.40 of the Penal Law of the State of New York.

B. On or about June 14, 1968, JUDGE FRED A. DICKINSON, sitting in Westchester County, Supreme Court, accepted the plaintiff's plea of simple assault to all charges levied against him. Thereafter, and on or about August 28, 1968, the plaintiff pleaded guilty to the crime of third-degree assault, a misdemeanor.

C. In September, 1968, the Board of Trustees of UNITED HOSPITAL voted not to reappoint the plaintiff to the medical staff of the UNITED HOSPITAL for the hospital year of 1969. The Board so notified the plaintiff of this decision.

D. On or about April 14, 1969, the plaintiff's license to practice medicine in the State of New York was revoked by the Commissioner of Education upon recommendation of the State Board of Regents and its Discipline Committee and its Medical Grievance Committee. As a result of this, no further action was taken in regard to the plaintiff's privileges at UNITED HOSPITAL.

E. On or about February 4, 1971, the Commissioner of Education of the State of New York entered Order No. 524, providing that the Order of Revocation of plaintiff's license to practice medicine within the State of New York be permanently stayed, effective July 1, 1971.

F. On or about February 10, 1971, the plaintiff wrote to UNITED HOSPITAL notifying the Hospital of his desire to obtain privileges at the Hospital effective July 1, 1971, the date upon which his license was to be restored pursuant to the above-stated Order of the Commissioner of Education of the State of New York. Pursuant to this request, the Hospital forwarded an application for medical staff privileges to the plaintiff and requested that the plaintiff complete same and return it to the Hospital. Upon its completion and return to the Hospital, the application was then channeled through the appropriate mechanism provided in the Hospital's Medical and Dental Staff Bylaws.

7. As set forth in the affidavit of RICHARD A. STOLNACKE, made and dated the 6th day of June, 1973, same having been previously submitted to this Court, on November 3, 1971, the Credentials Committee of UNITED HOSPITAL met and considered the plaintiff's application. After due consideration, it was the unanimous decision of the Credentials Committee not to recommend the plaintiff for privileges at the Hospital. I have had an opportunity to review the Minutes kept by the Credentials Committee at their November 3, 1971 meeting, a copy of which is annexed to the affidavit of RICHARD A. STOLNACKE, and as so annexed, is marked Exhibit "A", and I verily believe that based upon the Minutes of that meeting, the Credentials Committee acted in good faith in recommending that the plaintiff's application for medical staff privileges be denied.

8. Pursuant to the Bylaws of the Medical and Dental Staff of UNITED HOSPITAL, after the Credentials Committee has reached its recommendation with regard to an application for medical staff privileges, said recommendation is forwarded to the Medical Council of the Medical Staff for consideration. This procedure was followed and on December 14, 1971, the Medical Council of the Medical Staff of UNITED HOSPITAL met and considered the plaintiff's application for staff privileges, and the recommendation of the Credentials Committee with regard to same. As appears in Exhibit "D", annexed to the affidavit of RICHARD A. STOLNACKE, it was reported to the Medical Council that the Credentials Committee had recommended denial of the plaintiff's application because his credentials did not meet the standards of the Credentials Committee at that time. The Medical Council decided that the plaintiff's application for medical staff privileges would not be recommended, and this decision was transmitted to the Executive Committee of the Board of Trustees.

9. On January 4, 1972, the Executive Committee of the Board of Trustees of UNITED HOSPITAL met and considered the recommendations of the Credentials Committee and the Medical Council. After due consideration, the Executive Committee decided to deny the plaintiff's application for medical staff privileges at the Hospital. This recommendation was forwarded to the Board of Trustees of UNITED HOSPITAL who, after receiving and considering all of the aforementioned recommendations, decided not to offer privileges to the plaintiff and so advised the plaintiff of their determination on January 17, 1972. In that letter of January 17, 1972, the plaintiff was further advised of his right to request a hearing before the Joint Conference Committee of the hospital.

10. On February 10, 1972, the plaintiff received a letter from the Hospital acknowledging receipt of his letter requesting a hearing before the Joint Conference Committee, and advising him that such a hearing would be held on Wednesday, February 16, 1972, at 8:00 o'clock P.M. This letter, a copy of which is annexed to the affidavit of RICHARD A. STOLNACKE, and as so annexed, marked Exhibit "E", further stated:

"Your application for privileges at the hospital was denied because of your failure to provide requested surgical information from New Milford Hospital; vast discrepancies between statements on your application and operating room records of United Hospital; past charges of abortion for which you were indicted and for which you pleaded guilty to a lesser charge of assault; and general observations by members of the medical staff of the hospital regarding your conduct and activities in the hospital."

11. At the time of the appeal hearing, and as Chairman of the Joint Conference Committee, I presided over the hearing. At the hearing, the plaintiff was afforded an opportunity to respond to the specific charges which were the basis for the denial of medical staff privileges. The plaintiff and counsel of his choice were actually present at the hearing and did in fact present oral testimony on the plaintiff's behalf. A transcript of the hearing was prepared and a copy of same was sent to the plaintiff's attorney. The transcript has been previously submitted to this Court as an exhibit to the plaintiff's complaint. It is significant to note that at Page 32 of the transcript I personally asked the following question:

"MR. DAMMANN: There is no obligation for you or Dr. Barrett to respond to this. I was personally wondering whether there were any circumstances surrounding the indictment and subsequent plea of guilty to the misdemeanor which you or Dr. Barrett would like to bring forward, other than to have the record stand as it does, that there was such indictment and there was subsequently a plea and the lifting of his license."

In response to this query, plaintiff's counsel first spoke at great length of the delay with regard to bringing this matter before the Court and also discussed the justices and injustices of "plea bargaining" and its particular application to the criminal charges which were brought against the plaintiff. Plaintiff's counsel then stated, (at Page 35):

"So, other than this complication which grows out of the way that legal services and justice are dispensed in our system, the facts are before you. The basic underlying facts are not denied. There is no effort made to say that there was no surgical procedure performed; there is no effort made to say that. That's all behind, the details don't matter."

S. M. Ali

Based upon the foregoing, I, as well as my colleagues on the Joint Conference Committee, reasonably drew the inference that the plaintiff had, in fact, performed illegal abortions, and that such acts being of a medical nature, clearly reflected on the character and ethics of the plaintiff in regard to his medical practices. This fact along with the other reasons for denial of staff privileges previously noted formed the basis for consideration by the Committee of the plaintiff's application. Subsequent to the hearing granted to the plaintiff, the Joint Conference Committee convened, on March 27, 1972, for the purpose of considering the results of the hearing. At this meeting, it was unanimously concluded that all prior action, of all committees, be affirmed, and that privileges be denied the plaintiff. A copy of the Minutes of this meeting is annexed to the affidavit of RICHARD A. STOLNACKE, and as so annexed, is marked Exhibit "F". I can state of my own personal knowledge that the Joint Conference Committee in its deliberation acted fairly, impartially, and without any desire to malign the plaintiff. The only issues considered by the Joint Conference Committee in rendering a determination with regard to the plaintiff's application for medical staff privileges, were

those issues which were considered by previous committees, together with statements made by the plaintiff and his attorney at the Joint Conference Committee's hearing. The Committee's sole motivation was to act on behalf of the Hospital in a manner consistent with objectives of the institution and in a manner consistent with the objectives of the Hospital to the community it serves.

12. On April 17, 1972, a special meeting of the Executive Committee of the Board of Trustees was held in order to receive and act upon the recommendations of the Joint Conference Committee. After due consideration, the Executive Committee of the Board of Trustees unanimously voted to affirm the decision of the Joint Conference Committee to deny privileges to the plaintiff. This recommendation was received by the Board of Trustees in April, 1972, and the Board, after considering all the prior proceedings, unanimously voted to affirm the previous denial, and so advised the plaintiff of their final determination on May 3, 1972.

13. In my long experience as a practicing attorney in this state, and because of my involvement with not-for-profit hospitals, I have become familiar with many of the cases involving medical staff privileges. I am familiar with cases such as Mulvihill (cited in the STOLNACKE affidavit, the attorney's affirmation, and the Reply Memorandum of Law, all previously furnished to the Court), and verily believe that this decision fairly reflects the circumstances surrounding the activities of not-for-profit hospitals similar to the UNITED HOSPITAL in the State of New York. More specifically, a voluntary hospital, such as UNITED HOSPITAL, while subject to various federal and state rules and regulations, is not so internally controlled by either the state or federal government, as to render the actions of the Hospital equivalent to an act taken "under color of law."

14. As a practicing attorney, as well as a member of the Board of Trustees of a voluntary hospital, the case of Darling v. Charleston Community Hospital, 211 N.E.2d 253 (1965) cert. den. 383 U.S. 946 (1966) is well known to me. The Darling case involved treatment by a voluntary, non-salaried, attending physician. The Court openly held the hospital liable for the acts of that physician, even though the physician would be considered to be an independent contractor, on the ground that the hospital is under a duty to adequately screen its voluntary physicians to ensure that persons coming to the hospital receive adequate medical care. Darling marked the end of the hospital's right to take a passive role regarding the conduct of its voluntary, non-salaried medical staff. It is now the duty of the governing body to establish mechanisms for the medical staff to evaluate performance, to counsel colleagues, and even to remove a private physician from a case when there is an apparent and obvious difficulty. Failure to control medical staff privileges can result in additional liability to the hospital. The importance of the Darling case is that it measurably strengthened the power of the governing authority to dismiss a physician summarily or to refuse to appoint a physician, when his professional conduct or competency causes a clear-cut and immediate threat to patient care. It is not suggested that the Darling case or any other similar case allows a Board to act in an arbitrary manner. However, so long as a hospital has acted reasonably in arriving at its decision and in giving an applicant reasonable notice and an opportunity to be heard, a Court cannot and should not substitute its judgment as to an applicant's qualifications for that of the governing body of the hospital. Recognizing that the Board of Trustees of the Hospital are made up of individuals who serve voluntarily, without compensation, it would be detrimental, if not totally destructive to the voluntary hospital system, to put

these individuals in a position of continually having their day-to-day decisions subjected to judicial change. I believe a great many of the individuals who presently volunteer for such community service would refuse to do so in the future since they would almost assuredly be subjecting themselves to tenure filled with uncertainty and frustration and since they would undoubtedly find themselves involved in such a multiplicity of lawsuits as to make their continued service an unaffordable and undesirable burden.

15. Having read the complaint, I am familiar with the charge of conspiracy on the part of the various defendants named in this action. The plaintiff is of the belief that UNITED HOSPITAL and the various individually named defendants have conspired with other hospitals in Westchester County to prevent him from procuring membership on their medical staffs. Based upon my knowledge of the operation of a not-for-profit hospital, I do not believe that any hospital would deny medical staff membership to the plaintiff solely on the basis of what has transpired at UNITED HOSPITAL. Each hospital operates under its own Medical Staff Bylaws and each hospital is individually responsible for its own actions. I know of my own personal knowledge that UNITED HOSPITAL has never, so long as I have been a member of the Board of Trustees, been so affected by the activities of other hospitals insofar as staff privileges are concerned that it did not consider each case independently and arrive at its own conclusion. Furthermore, I have discussed this allegation with many of my colleagues at the Hospital, and they too find this allegation of conspiracy to be unfounded. In determining who shall have privileges at the Hospital, each Board exercises its own personal judgment and discretion.

16. As a practicing attorney and a member of the Board of Trustees of UNITED HOSPITAL, I am aware of the fact that the Legislature of the State of New York enacted Section 2801-b of the Public Health Law, whose language has been previously submitted to the Court. I am similarly familiar with Section 2801-c of the Public Health Law permitting the Attorney General, upon request of the Public Health Council or the Commissioner of Health to maintain an action in the Supreme Court to enjoin violations of Section 2801-b. However, the effective date of Section 2801-b was May 15, 1972. The plaintiff, WILLIAM A. BARRETT, M.D., was formally notified of the Board of Trustees' final determination on May 3, 1972, twelve (12) days prior to the effective date of Section 2801-b. To this extent, Section 2801-b is inoperative since all actions taken on the part of the individual defendants and of the defendant, UNITED HOSPITAL, were taken prior to the effective date of this Section. Notwithstanding the statute's inapplicability, the hospital did follow the criteria set down in Section 2801-b since, in rejecting the applicant, the Board of Trustees did provide the plaintiff with the reasons for rejection and the reasons stated did pertain to the plaintiff's competency, character, and the objectives of the institution.

17. I have been advised that the Motion originally made in this case by the defendants will be treated as a Motion for Summary Judgment and in light of all of the foregoing, and all that has been submitted to the Court, I believe that there are no triable issues of fact and that the defendants are entitled to Summary Judgment.

WHEREFORE, your deponent respectfully requests that an Order be entered pursuant to Rule 56 of the Federal Rules of Civil Procedure for United States District Courts, granting

Summary Judgment to the defendants, and that the defendants be
awarded such other and further relief as to this Court may seem
just and proper.

/s/
RICHARD W. DAMMANN

Sworn to before me this
9th day of May, 1974.

/s/
Notary Public

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

WILLIAM A. BARRETT, M.D.,	:	INDEX NO. 73 Civ. 1716
Plaintiff	:	<u>JUDGE BAUMAN</u>
- against -	:	AFFIRMATION IN SUPPORT OF
UNITED HOSPITAL, et al,	:	MOTION FOR SUMMARY JUDG-
	:	<u>MENT</u>
Defendants	:	

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ROBERT ANDREW WILD, ESQ., an attorney and counsellor admitted to practice before the United States District Court for the Southern District of New York, affirms the following statements to be true under penalties of perjury:

1. I am a member of the law firm of HAYT, HAYT, TOLMACH & LANDAU, ESQS., attorneys for the defendants, UNITED HOSPITAL, STOLNACKE, JOHNSON, JENNINGS, STEERS, REES, GANTZ, LOMBARD, GILE, DAMMANN, LANE, KELSEY, MARX, MOSBACHER, SHATTUCK, HALLOCK, and DALE, and am fully familiar with the facts and circumstances in this action.

2. I make this Affirmation in support of the above-named defendants' Motion, which, pursuant to the direction of the HONORABLE ARNOLD BAUMAN, will be treated by the Court as a Motion for Summary Judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure for the United States District Courts.

3. Since the date of the submission of the original Motion papers, and since the date of oral argument in this matter, several decisions have been handed down from the Federal Courts which either directly or collaterally affect the plaintiff's causes of action. In light of this, I feel it to be essential to the determination of this case to bring these cases to the Court's attention. Therefore, submitted herewith is a Supplemental Reply

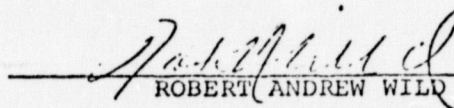
Memorandum of Law bringing up to date the original Reply Memorandum of Law submitted at the time of the original submission of this Motion.

4. Based upon the law in this jurisdiction, and based upon recent developments in the area of medical staff litigation throughout the country, it is respectfully suggested that the plaintiff has failed to state a cause of action upon which relief can be granted by this Court. The action taken by the defendants, in regard to plaintiff's application for medical staff privileges, was not taken "under color of law", but rather were the acts of a non-governmental entity subject to but not controlled by the laws of the county, state, and federal government. It has been and continues to be the substantive law of this Circuit that the Court will not substitute its judgment for the judgment of the Board of Trustees of a hospital except in instances where the Board has acted improperly, arbitrarily, capriciously, or contrary to law. It is respectfully submitted that the action taken with regard to the plaintiff, WILLIAM A. BARRETT, M.D., was not taken improperly, arbitrarily, capriciously, or contrary to any law, but rather, was taken in good faith and in furtherance of the Hospital's high standards and that such action was taken by the plaintiff's peers and by the Board of Trustees of the Hospital, after full disclosure of all facts and after granting the plaintiff notice, an opportunity to be heard, and granting to the plaintiff all rights and privileges allowed under the Bylaws of the Hospital and the Medical-Dental Staff, in regard to applications for staff appointments.

WHEREFORE, your affiant respectfully requests that an Order be entered pursuant to Rule 56 of the Federal Rules of Civil Procedure for the United States District Courts, granting summary judgment to the above-named defendants, and that the

defendants be awarded such other and further relief as to this Court may seem just and proper.

Dated: May 1, 1974


ROBERT ANDREW WILD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
WILLIAM A. BARRETT, M.D.,

Plaintiff

- against -

UNITED HOSPITAL, et al,

Defendants

: INDEX NO. 73 Civ. 1716

: ATTORNEY'S STATEMENT
: OF SERVICE BY MAIL

STATE OF NEW YORK)

(ss.:

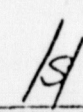
COUNTY OF NASSAU)

ROBERT ANDREW WILD, an attorney admitted to practice before the United States District Court for the Southern District of New York, being associated with HAYT, HAYT, TOLMACH and LANDAU, ESQS., affirms under penalties of perjury:

1. That I am over the age of eighteen (18) years of age and am not a party to this action.

2. That on the 3rd day of May, 1974, I served a copy of the within Supplemental Reply Memorandum of Law upon LEVY, GUTMAN, GOLDBERG & KAPLAN, ESQS., attorneys for the plaintiff, and CLARK, GAGLIARDI & MILLER, ESQS., attorneys for the defendants, GRANT, SUDBAY, WASSERMAN, KAUFMAN, ALEXANDER, BALCHUNAS, SEANOR, WILSON, DELANEY, DELZIO, FELCH, HALPERN, ESCHIS, SCHWARTZMAN, SILBERSTEIN, WILSON, DRAGO, HAGGERTY, HENSEN, LEVER, ROTH, SHRAGOWITZ, and DEE, by depositing a copy hereof enclosed in a postpaid wrapper addressed to the above-named, at 363 Seventh Avenue, New York, New York, 10001, and 175 Main Street, White Plains, New York, 10601, respectively, the addresses designated by them for that purpose in the official depository located at 55 Northern Boulevard, Great Neck, New York, under the exclusive care and custody of the United States Post Office Department.

Dated: Great Neck, New York
May 3, 1974


ROBERT ANDREW WILD

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

WILLIAM A. BARRETT, M.D.,	:	
Plaintiff,	:	73 Civ. 1716
-against-	:	(Judge Arnold Bauman)
UNITED HOSPITAL, et al.,	:	
Defendants.	:	<u>AFFIDAVIT</u>

----- x

STATE OF NEW YORK)
 : ss.:
COUNTY OF WESTCHESTER)

WILLIAM A. BARRETT, being duly sworn, deposes
and says:

1. I am the plaintiff in this action and I make this affidavit in response to a notice given by telephone on April 24, 1974 that Judge Arnold Bauman intends, upon consideration of the motions by the defendants to dismiss the complaint pursuant to the provisions of Rule 12, to consider the supporting affidavits and treat the motions as having been made under Rule 56 for summary judgment.

2. On page 4 of the affidavit of Charles J. Alexander, it is alleged that information requested of me had not been provided until October 1971 and that other information had never been provided. I promptly provided all information as soon as I was able to do so and no information was ever not provided. I respectfully refer

the Court to paragraphs FIFTY-SIXTH and FIFTY-EIGHTH of my verified complaint and to Exhibits B and C thereof.

3. Throughout the affidavit of Dr. Alexander and the other affidavits there are allegations concerning meetings and proceedings taken by various committees and organizations within the hospital for the alleged purpose of considering my application. I deny that any such meetings or proceedings were held for that purpose and affirmatively allege that such meetings or proceedings were taken by defendants for the purpose of providing a facade of consideration and due process to provide a cover and documentation for a previously conceived determination to deny plaintiff hospital privileges because of the abortion charges and assault conviction, regardless of the fact that he at all times was and remains fully qualified for such privileges.

4. I apologize for a typographical error appearing in paragraph SIXTY-FIRST of my complaint. The meeting therein set forth did not occur on January 16, 1973 but in fact occurred on January 16, 1972.

5. Plaintiff never saw nor knew of the existence of the minutes attached to Dr. Alexander's affidavit as Exhibits C, D and F until after his attorney was served with such documents in this action.

6. The first notification which I had of the official action by the defendants was by the letter

of January 17, 1972 from defendant Stolnacke annexed as Exhibit F to Dr. Alexander's affidavit. Promptly upon receipt thereof, and on February 24, 1972, I requested the hearing herein.

7. No statement of the alleged reasons for the actions of the defendants was ever provided to me orally or in writing prior to receipt by me of the letter dated February 10, 1972 appearing as Exhibit G to the affidavit of Dr. Alexander.

8. I am advised by counsel that the affidavits of Dr. Alexander and the other moving affidavits are replete with conclusory allegations and arguments of law, and it is only to the allegations of fact that I address this responding affidavit.

9. In the moving affidavit of Mr. Stolnacke, the hospital administrator admits my twenty years of experience and performance on the staff of defendant hospital and nowhere in this affidavit or in any other of the moving papers is there anything to impune the quality and reliability of my professional performance and accomplishments. I was at all times fully qualified for staff privileges during the time which I enjoyed them and no suggestion or imputation to the contrary was ever made by or on behalf of any patient, physician, administrator, or other person. I am now and remain fully qualified for such staff privileges. The only thing which has changed

being additional experience which I have gained by the practice of my profession over the years and the fact that I have been convicted of the assault count originating in an abortion charge.

10. I was advised by defendant Dr. Grant months after I filed my papers originally, that the application could not be processed until such time as I was a full member of the County and State Medical Society. As appears from Exhibit C of my complaint, it was not until October of 1971 when I learned that such membership was not actually a prerequisite to consideration of my application, and I thereupon promptly filed additional data which I had been holding up because of the misapprehension originating with defendant Grant.

11. I respectfully call to the attention of the Court paragraphs 5 and 6 of the affidavit of hospital administrator defendant Stalnacke which stress that the standards of appointment and other standards for internal management of the hospital are prerequisites to hospital participation in state, federal and local governmental programs.

12. I respectfully redirect the attention of the Court to the letters of August 10 and December 3, 1973 addressed to the Court by my attorney.

13. My ability to earn a professional living has been substantially adversely affected by the denial of the privileges herein involved to an amount many times in excess of the jurisdictional amount of \$10,000.00. I am now suffering and will continue to suffer such financial detriment and the other detriments set forth in the complaint unless the relief sought from this court is granted.

14. In support of my allegations that I have been blackballed by the defendants, I set forth the following facts:

A. As to Cross County Hospital, a private hospital in the Cross County Shopping Center, Yonkers, New York

Until the time of my arrest I had all privileges at Cross County Hospital. When I was put on leave of absence by United Hospital following my arrest, I spoke to Mr. Manus, the administrator at Cross County Hospital and told him the facts. He told me my privileges at Cross County would remain in effect so long as my license to practice medicine in the State of New York was not revoked or suspended as it was not until long thereafter. As a matter of fact, I performed six or eight surgical procedures in Cross County Hospital in that week.

Shortly thereafter, and in October 1966, Mr. Manus contacted me and told me that he had been called by a representative of defendant United Hospital which

advised him that Cross County should force me to quit. Mr. Manus told me that, since Cross County is a private hospital operating for the purpose of making a profit and that the United Hospital is a community hospital, Cross County is vulnerable to being tied up by reports to public authorities, the mere investigation of which would interfere with the orderly operations of Cross County and that therefore Mr. Manus, under threat of retaliatory action by United, requested that I voluntarily take a leave of absence from Privileges at Cross County Hospital.

In 1968 when I received my Certificate of Relief from Disabilities, I attempted to reach Mr. Manus but was unable to get a response of any kind. Thereafter Dr. W. Price Fitch, a then retired and well-known physician, asked Mr. Manus on my behalf to permit me to enjoy privileges at Cross County Hospital, but Mr. Manus and Cross County Hospital failed and refused to do so because of pressure from defendant United Hospital.

B. As to Greenwich Hospital

Late in 1973 and after the commencement of this action, I spoke with Mr. Jones, the administrator of Greenwich Hospital, and requested application blanks for privileges at that hospital. He told me that he was aware of the facts of my personal history relevant to the abortion charges and assault conviction and that he did not think there would be any difficulty. He promptly supplied application blanks. On January 24, 1974 I spoke with

Dr. Forbes Delaney, the Chairman of the Credentials Committee, to whom I was referred by Mr. Jones, as to the status of my application. Dr. Delaney told me that Greenwich Hospital would not pay any attention to the events of 1966 or to the blackball situation and that I would have to move my office to Greenwich, Connecticut so that I could enjoy staff privileges. He assured me that I could in all likelihood make that move without fear, but I stressed the importance of the commitment of closing my office and moving my home to Greenwich, Connecticut from Mamaroneck, New York. Dr. Delaney told me he was sure there would be no difficulty, but that he would speak with the other members of the committee and give me the reassurance I requested before I committed myself. I thereafter had a subsequent conversation with Dr. Delaney and he told me that there was no way I was going to get on the Greenwich Hospital staff, but that he could not advise me how much effect the "blackball" which existed with respect to me had affected the decision.

C. As to St. Agnes Hospital, White Plains

My application at this hospital has been pending since February 4, 1974. There has been no decision, nor can I get any answer from anyone of the staff or associated with St. Agnes as to what is causing the delay and lack of favorable action. During my interview with the Chief Surgeon, Dr. Raymond Williams, there was no question concerning my professional credentials and competence.

D. As to Park East Hospital

Eugene Kligeman is the former administrator of Wickersham Hospital where I had previously enjoyed staff privileges. When Mr. Kligeman became administrator of the newly organized Park East Hospital, he contacted me and invited me to join the staff, being fully aware of my personal and professional history, including the abortion charge and assault plea. I was granted temporary staff privileges at Park East Hospital on July 20, 1973 pending final action on my filed application. On December 12, 1973 Mr. Kligeman asked me to refile because of a further reorganization or merger with the structure of Park East Hospital and I promptly did so. On April 22, 1974 I was mailed a letter advising me that Park East Hospital was revoking my temporary privileges and that my application for staff privileges was denied. I was invited to telephone Mr. Kligeman to further speak about the matter, but repeated attempts to reach him by telephone since April 23, 1974 when I received the shocking news have been unavailing.

E. As to other hospitals

Immediately after the charge was made against me, I had a conversation with Dr. Marvin Ackerman, a highly respected and energetic physician who was then chief of the staff of three hospitals and on the staff of ten hospitals

in addition to maintaining several private offices for the practice of medicine. Dr. Ackerman told me that with his connections there should and would be no difficulty in getting me admitted to several hospitals and that he would bend every effort to effect that result. One after another, however, the administrators of the various hospitals told Dr. Ackerman that there was no way possible by which, given what had happened, I could ever be admitted to the staff of any hospital. Dr. Ackerman told me that the mere mention of my name to a hospital administrator in the areas far removed from the United Hospital brought recognition as that of a physician who was under no circumstances to be considered. Dr. Ackerman was advised by the administrator of Union Hospital in the Bronx that he had received a message from an unidentified source addressing itself "to all hospitals" warning them against permitting me to become associated with any hospital. At both Parkchester Hospital and Westchester Square Hospitals in the Bronx, Dr. Ackerman was told that I should not even apply because they had been warned in advance against me. At Mt. Eden Hospital in the Bronx where Dr. Ackerman is a close friend of Dr. Abrams, the administrator of the hospital, Dr. Ackerman was told the same thing. Most recently, at St. Barnabas Hospital, where there is a shortage of staff and there is a spot for me and they need me, my application is not welcome because of the blackball situation against me.

F. As to New Rochelle Medical Center

In 1971 I had a conversation with Mr. Alex Norton who is the administrative officer of the New Rochelle Medical Center. I approached him for the purpose of securing application blanks to become affiliated with that hospital and to secure staff privileges there. Mr. Norton was most pleasant, but he advised me that he would not even give me the application blanks and that it would be absolutely useless for me to file them, constituting a waste of time and effort on my part and an inconvenience to him and his hospital. He said that once a physician had been blackballed by a hospital there was no possibility whatever that he would even be considered by any hospital within a fifty mile radius of the blackballing hospital. He told me that in the circumstances he would not give me the forms and would not accept a filing, much as he regretted having to tell me the facts.

15. Furthermore, charges against me were filed with the American College of Surgeons, of which I am and have been a Fellow by defendant J. Douglas Halleck who sought to have me thrown out of that professional organization. Fortunately, that organization with its headquarters in Chicago, is sufficiently far removed from the influence of United Hospital so that the effort was not successful, although hearings were held.

16. Based upon the recitation of the history of what has been happening in my attempt to practice my profession and serve my patients, the conclusion is inescapable that I have been blackballed and made persona non grata by the actions of the defendants in circularizing their colleagues and hospital administrators in one fashion or another.

WHEREFORE, I respectfully urge upon the Court, that, given the present aspect of this case, the facts are in no wise in dispute and the moving affidavits under Rule 56 make appropriate the granting of summary judgment in my favor promptly and fully restoring to me the ability to practice my profession and reconstruct my life and granting to me all the other relief prayed for in the complaint.

Sworn to before me, this

2nd day of May, 1974

W a Barrett

WILLIAM A. BARRETT

NOTARIES PUBLIC
STATE OF NEW YORK
COUNTY OF ALBANY
JULIUS J. JAMES
JULIUS J. JAMES
JULIUS J. JAMES
JULIUS J. JAMES

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x
WILLIAM A. BARRETT, M.D., :

Plaintiff, :

-against- :

UNITED HOSPITAL, et al., :

Defendants. :

73 Civ. 1716

(Judge Arnold
Bauman)

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STATEMENT PURSUANT TO
RULE 9(c)

Plaintiff supplies this statement of all the material facts as to which the plaintiff contends there is no genuine issue to be tried, thereby justifying granting of the motion for summary judgment in favor of the plaintiff:

1. Plaintiff is a duly licensed and qualified physician and surgeon.
2. Defendant United Hospital is a community hospital under the Laws of the State of New York.
3. Defendant hospital has accepted federal Hill-Burton money in the past as is accepting federal and state Medicare and Medicaid and other funds.
4. Defendant United Hospital performs emergency and poverty services for the people within the area of its mandate, services which would otherwise fall as duties upon the State of New York.

5. Each of the individual defendants is in fact as described in the complaint.

6. Except for military service during the Second World War, plaintiff has been an intern, resident, and staff member of defendant hospital since July 1, 1940.

7. On September 28, 1966 plaintiff was arrested and charged with criminal abortion.

8. On August 29, 1968, plaintiff was convicted upon his guilty plea of the crime of assault in the third degree, a misdemeanor.

9. On September 12, 1968, plaintiff received from the State of New York a Certificate of Relief from Forfeiture and Disability.

10. From immediately after the time of his arrest plaintiff was on the status of leave of absence from defendant hospital until September 16, 1968 when the Board of Trustees of defendant hospital determined not to reappoint him as an attending surgeon.

11. Determination by defendant hospital's trustees on September 16, 1968 was expressly made without prejudice.

12. Plaintiff's license to practice medicine in the State of New York was revoked because of the abortion charge on September 14, 1969, but was restored by order dated February 4, 1971, effective July 1, 1971.

13. On February 10, 1971 plaintiff duly applied for privileges at defendant hospital.

14. Thereafter plaintiff duly completed all requirements in connection with such application.

15. On February 16, 1972 the Joint Conference Committee of defendant hospital held a meeting at which plaintiff and his counsel presented arguments and materials in support of plaintiff's application.

16. The Statements of Reasons for denial of privileges to plaintiff by defendant hospital as set forth by defendant hospital are:

A. Failure to provide requisite surgical information from New Milford Hospital.

B. Vast discrepancies between statements on the application and operating room records of the defendant hospital.

C. Past charges of abortion with respect to which defendant pleaded guilty to the third degree assault.

D. General observations by anonymous members of defendant hospital's medical staff regarding plaintiff's conduct and activities.

17. The required information from New Milford Hospital was in fact supplied.

18. The alleged discrepancies between application and operating room records were adequately explained.

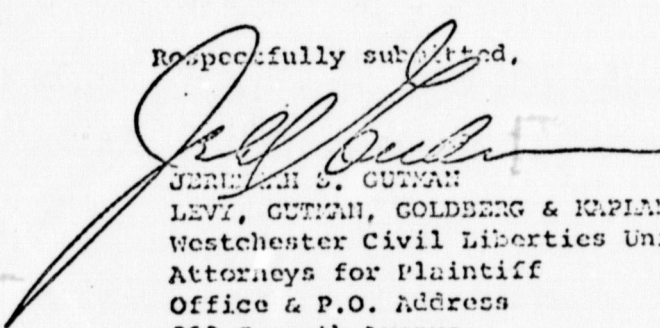
19. No specifications of the alleged conduct and activities observed were ever provided, although duly demanded.

20. No identification of the alleged observers nor confrontation with them was provided, although duly demanded.

21. Plaintiff has been unable despite repeated and diligent efforts to secure staff privileges at any other hospital and is being presently severely limited in the ability to practice medicine as a result thereof and of the denial by defendant hospital of staff privileges.

Dated: New York, New York
May 2, 1974

Respectfully submitted,



JEREMIAH S. GUTMAN
LEVY, GUTMAN, GOLDBERG & KAPLAN
Westchester Civil Liberties Union
Attorneys for Plaintiff
Office & P.O. Address
363 Seventh Avenue
New York, New York 10001
(212) 736 2226

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X
WILLIAM A. BARRETT, M. D.

Plaintiff

-against-

JUN 1974

JUDGMENT

73 Civil 1716 (AB)

UNITED HOSPITAL; RICHARD A. STOLNACKE,
Executive Director of United Hospital,
individually and in his official capacity;
ALFRED D. GRATT, M.D.; JAMES A. LUDWAY, M.D.;
EUGENE WASSERMAN, M.D.; J. DOUGLAS HALLOCK, M.D.;
H. CLAY JOHNSON; WILLIAM H. JENNINGS; CHARLES R. C.
STERN; WILLIAM ROSE; JACK GUTZ; RICHARD D.
LOMBARD; DAVID GILE; RICHARD W. DAMON; DR.
THOMAS H. LAKE; ERWIN H. KAUFMAN, M.D.; CHARLES J.
ALEXANDER, M.D.; ANTHONY PALCHURAS, M.D.;
EUGENE SEARER, M.D.; DAVID A. WILSON, M.D.;
JOHN H. DALE, JR., M.D.; LEO T. DELANEY, M.D.;
MRS. EDNA DELZIO, R.N.; WILLIAM C. FELCH, M.D.;
ABRAHAM I. HALPERN, M.D.; MRS. HENRY EISEN;
LAWRENCE HARR, JR., M.D.; JOEL J. SCHWARTZMAN, M.D.;
JOSEPH EISENBERG, M.D.; DAVID A. WILSON, M.D.;
C. JONATHAN SHATTUCK; DANIEL DELZIO, M.D.; VIRGINIA
HAGGERTY, M.D.; PHILIP JOHNSON, M.D.; CHELBY LEVY, M.D.;
and RONALD ROTH, M.D.

Defendants
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Defendants having moved the Court to dismiss pursuant to Rule 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, and the motion having come on to be heard before the Honorable Arnold Bauman, United States District Judge, and the Court thereafter on May 24, 1974, having handed down its Opinion granting the said motion, it is,

ORDERED, ADJUDGED and DECREED: That defendants UNITED HOSPITAL, RICHARD A. STOLNACKE, Executive Director of United Hospital, individually and in his official capacity, ALFRED D. GRATT, M.D., JAMES A. LUDWAY, M.D., EUGENE WASSERMAN, M.D., J. DOUGLAS HALLOCK, M.D., H. CLAY JOHNSON, WILLIAM H. JENNINGS, CHARLES R. C. STERN, WILLIAM ROSE, JACK GUTZ, RICHARD D. LOEBARD, DAVID GILE, RICHARD W. DAMON, DR. THOMAS H. LAKE, ERWIN H. KAUFMAN, M.D., CHARLES J. ALEXANDER, M.D., ANTHONY PALCHURAS, M.D., EUGENE SEARER, M.D., DAVID A. WILSON, M.D., JOHN H. DALE, JR., M.D., LEO T. DELANEY, M.D., MRS. EDNA DELZIO, R.N., WILLIAM C. FELCH, M.D., ABRAHAM I. HALPERN, M.D., MRS. HENRY EISEN, LAWRENCE HARR, JR., MRS. JOEL HROBACHER, JR., MARTIN KESCHI, M.D., JOEL J. SCHWARTZMAN, M.D., JOSEPH EISENBERG, M.D., DAVID A. WILSON, M.D., C. JONATHAN SHATTUCK, DANIEL DELZIO, M.D., VIRGINIA HAGGERTY, M.D., PHILIP JOHNSON, M.D., CHELBY LEVY, M.D., and RONALD ROTH, M.D.

Bauman, J.

73 Civil 1716 cont'd Barrett, M.B. -v- United Hospital, et al

JACOB SHIRACKWITZ, D.D., and MORRIS D.B., D.D., have judgment against plaintiff
WILLIAM A. BAUMANN, D.D., dismissing the complaint.

Dated: New York, N.Y.
June 5, 1974

William A. Baumann
Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
WILLIAM A. BARRETT, M.D., :

Plaintiff, :

-against- :

UNITED HOSPITAL; RICHARD A. STOLNACKE, :
Executive Director of United Hospital, :
individually and in his official :
capacity; ALFRED D. GRANT, M.D.; :

JAMES A. SUDBAY, M.D.; EUGENE WASSERMAN, : NOTICE OF APPEAL
M.D.; J. DOUGLAS HALLOCK, M.D., H. :

CLAY JOHNSON; WILLIAM H. JENNINGS; : 73 Civ. 1716

CHARLES R. C. STEERS; WILLIAM REES; :
JACK GANTZ; RICHARD D. LOMBARD; DAVID : Bauman, D.J.

GILE; RICHARD W. DAMMONN; MRS. THOMAS :
H. LANE; EDWIN H. KAUFMAN, M.D.; :

CHARLES J. ALEXANDER, M.D.; ANTHONY :
BALCHUNAS, M.D.; H. EUGENE SEANOR, :

M.D.; DAVID A. WILSON, M.D.; JOHN H. :

DALE, JR., M.D.; LEO T. DELANEY, M.D.; :

MRS. EDNA DELZIO, R.N.; WILLIAM C. :

FELCH, M.D.; ABRAHAM L. HALPERN, M.D.; :

MRS. HARVEY KELSEY; LAWRENCE MARX, JR.; :

MRS. EMIL MOSBACHER, JR.; MARTIN :

NESCHI, M.D.; JOEL J. SCHWARTMAN, :

M.D.; JOSEPH SILBERSTEIN, M.D.; DAVID :

A. W. WILSON, M.D.; C. JONATHAN :

SHATTUCK, SAMUEL DRAGO, M.D., VIRGINIA :

HAGGERTY, M.D., PHILIP JENSEN, M.D.; :

SHELBY LEVER, M.D.; HAROLD ROTH, M.D.; :

JACOB SHRAGOWITZ, M.D. and RONALD DEE, :

M.D., :

Defendants. :

-----x
S I R :

PLEASE TAKE NOTICE, that Plaintiff hereby appeals
to the United States Court of Appeals for the Second
Circuit from the order of Judge Arnold Bauman dated May
23, 1974 and filed on May 24, 1974 and from each and every
part and from the whole thereof.

Dated: New York, New York
June 20, 1974

Yours, etc.,

JEREMIAH S. GUTMAN, ESQ.
LEVY, GUTMAN, GOLDBERG & KAPLAN
Attorneys for Plaintiff
363 Seventh Avenue
New York, New York 10001

TO: HAYT, HAYT, TOLMACH & LANDAU
55 Northern Boulevard
Great Neck, New York 11021
Attorneys for Defendants

CLARK, GAGLIARDI & MILLER
174 Main Street
White Plains, New York 10601
Attorneys for Defendants.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

WILLIAM A. BARRETT, M.D.,	:	AFFIDAVIT OF SERVICE
Plaintiff,	:	BY MAIL
-against-	:	
UNITED HOSPITAL, et al.,	:	73 C.V. 1716
Defendants.	:	

-----X

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

EUGENE N. HARLEY, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 114 West 16th Street, New York, New York. That on the 20th day of June, 1974, deponent served the within Notice of Appeal upon Hayt, Hayt, Tolmach & Landau the attorneys for defendants United Hospital, Stollacke, Johnson, Hennings, Steers, Rees, Gantz, Lombard, Gile, Dammonn, Lane, Kelsey, Marx, Mosbacher, Shattuck, Hallock and Dale, at 55 Northern Boulevard, Great Neck, New York 11021 and Clark, Gagliardi & Miller the attorneys for defendants Grant, Sudbay, Wasserman, Kaufman, Alexander, Balchunas, Seanor, Delaney, Felch, Halpern, Neschi, Schwartzman, Silberstein, Wilson, Drago, Haggerty, Jensen, Lever, Roth, Dee and Shragowitz at 174 Main Street, White Plains, New York 10601 the addresses designated by said attorneys respectively, for that purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in an official depository under the exclusive care and custody of the United States Post Office within the State of New York.

Sworn to before me, this
day of June, 1974

EUGENE N. HARLEY

PAUL G. STACK
Notary Public, State of New York
No. 24-014000
Qualified in Kings County
Commission Expires March 23, 1976

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
 WILLIAM A. BARRETT, M.D., : Case No. 73 Civ 1716
 Plaintiff, : Judge Bauman
 -against- : CLERK'S CERTIFICATE
 UNITED HOSPITAL, et al., :
 Defendant. :
 -----x

I, RAYMOND F. BURGHARDT, Clerk of the District Court of the United States for the Southern District of New York, do hereby certify that the certified copy of docket entries lettered A-B, and the original filed papers numbered 1 thru 18, inclusive, constitute the record on appeal in the above entitled proceeding; except for the following missing documents:

DATE FILED

PROCEEDINGS

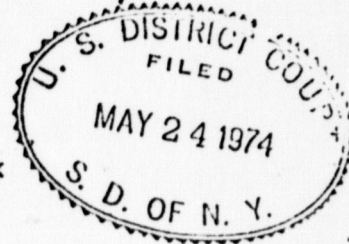
IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this _____ day of _____, in the year of our Lord, One thousand nine hundred and seventy four, and of the Independence of the United States the _____ year.

Clerk of the Court

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



WILLIAM A. BARRETT, M.D.,

Plaintiff,

-against-

OPINION

73 Civ. 1716

#46135

UNITED HOSPITAL; RICHARD A. STOLNACKER,
Executive Director of United Hospital,
individually and in his official capacity;
ALFRED D. GRANT, M.D.; JAMES A. SUDWAY,
M.D.; EUGENE WASSERMAN, M.D.; J. DOUGLAS
HALLOCK, M.D.; H. CLAY JOHNSON; WILLIAM H.
JENNINGS; CHARLES R. C. STEERS; WILLIAM
REES; JACK GANTZ; RICHARD D. LOMBARD;
DAVID GILE; RICHARD W. DANNON; MRS. THOMAS
H. LANE; EDWIN H. KAUFMAN, M.D.; CHARLES J.
ALEXANDER, M.D.; ANTHONY BALCHUNAS, M.D.;
H. EUGENE SEANOR, M.D.; DAVID A. WILSON,
M.D.; JOHN H. PALE, JR., M.D.; LEO T.
DELANEY, M.D.; MRS. EDNA DELETO, R.N.;
WILLIAM C. FULCH, M.D.; ABRAHAM I. HALPERN,
M.D.; MRS. HARVEY KELSEY; SARALACE MARK, JR.,
MRS. PAUL MOSBACHER, JR.; MARTIN MESCHI,
M.D.; JOEL J. SCHWARZMAN, M.D.; JOSEPH
SILBERSTEIN, M.D.; DAVID A. W. WILSON, M.D.;
C. JONATHAN SHATTUCK; SAMUEL DRAGO, M.D.;
VIRGINIA HASSERBY, M.D.; PHILIP JENSEN, M.D.;
SHELLEY LEVY, M.D.; HAROLD ROTH, M.D.; JACOB
SHRAGOVITZ, M.D.; and RONALD DEE, M.D.,

Defendants.

APPEARANCES

Levy, Gutman, Goldberg & Kaplan c/o Westchester Civil
Liberties Union (Jeremiah F. Gutman, Fayene Harley,
Donald Deenbergh, of counsel) for plaintiff.

Hayt, Hayt, Tolmach & Landau, Great Neck, New York
(Robert Andrew Wild, of counsel) for defendants United
Hospital, Stolnacker, Johnson, Jennings, Steers, Rees,
Gantz, Lombard, Gile, Dannon, Lane, Kelsey, Mark,
Mosbacher, Shattuck, Hallock and Pale.

Clark, Gagliardi & Miller, White Plains, New York
(Lawrence T. D'Aloise, Jr., of counsel) for defendants
Grant, Sudbay, Wasserman, Kaufman, Alexander, Balchunas,
Seanor, Delaney, Felch, Halpern, Meschis, Schwartzman,
Silberstein, Wilson, Drago, Haggerty, Jensen, Lever,
Roth, Dee and Shragowitz.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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-----x
WILLIAM A. BARRETT, M.D.,

Plaintiff,

OPINION

73 Civ. 1716

-against-

UNITED HOSPITAL, et al.,

Defendants. .

-----x
BAUMAN, D. J.

In this action for declaratory, injunctive, mandamus and monetary relief, the plaintiff physician alleges violations of the First, Fifth, Eighth, Ninth and Fourteenth Amendments of the United States Constitution and of the Civil Rights Act of 1871^{1/} by the defendant Hospital, its Board of Directors, employees, committees and staff members. All the defendants now move to dismiss under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. In effect, both of these motions present the identical contention that the absence of "state action" in the violations alleged by plaintiff in his complaint is fatal to his cause of action.

I.

For purposes of this motion, plaintiff's version of the facts are taken as true:
2/

The plaintiff is a physician who, for almost twenty years, was a member of the staff of United Hospital, a private hospital located in Port Chester, New York. In 1966, he was indicted and charged with the crime of criminal abortion.^{3/} Upon his subsequent plea of guilty to assault in satisfaction of all charges, plaintiff's license to practice medicine in New York was revoked as were all his staff privileges at the defendant Hospital.^{4/} On February 4, 1971, the Commissioner of Education restored plaintiff's license to practice medicine within the state effective July first of that year. Thereupon plaintiff immediately applied for the restoration of his privileges at United Hospital.

The by-laws of the Hospital in effect at that time, relating to appointments to the Medical Staff, prescribed the following procedure: Applications are considered first by a "Credentials Committee" which makes a recommendation to a "Medical Council of the Medical Staff" which in turn makes a recommendation to the Board of Trustees. If the application is denied, the applicant may avail himself of the right to a hearing before a "Joint Conference Committee" which, following the hearing, makes its recommendations to the Board of Trustees.

Following the denial of his application plaintiff requested a formal hearing which was finally held on February 16, 1972.^{5/} The hearing resulted in an affirmation of the prior actions of the various committees and a recommendation to the Board of Trustees that plaintiff be denied staff privileges.

The Board of Trustees thereafter accepted this recommendation and plaintiff was so advised on May 3, 1972. Almost one year later the complaint was filed in the instant case, charging that the defendants, as members of the various committees which considered and passed upon Dr. Barrett's application, ^{6/} had violated his civil rights and various constitutional protections in denying him admittance to the Hospital staff. Specifically the complaint alleges:

(1) That the hearing procedures followed by the Joint Conference Committee denied plaintiff due process (§ 61).

(2) That the defendants had created a scheme to prevent plaintiff from being granted privileges at either United Hospital or at other hospitals in neighboring areas (§ 62).

(3) That the denial of staff privileges was without basis in law or fact, was beyond defendants' authority, and was arbitrary, capricious, vindictive and an abuse of discretion (§ 64).

(4) That certain of the defendants had conspired to destroy plaintiff's reputation and professional practice (§ 69).

(5) That certain of the defendants had communicated false and malicious statements concerning plaintiff to administrators and professional staff at other hospitals and had used influence and pressure to cause patients, hospitals and other colleagues to shun and exclude plaintiff (§ 70).

Based on these specific allegations plaintiff contends:

that his constitutional rights have been violated in that he
 has been prevented from associating freely and privately with
 his patients and thereby has been deprived of due process and
 equal protection^{10/} and subjected to cruel and unusual punishment.^{11/}
 Therefore, plaintiff argues, defendants' activities have deprived
 him of "rights, privileges [and] immunities secured by the
 Constitution" in violation of Title 42 U.S.C. §§ 1983, 1985 and
 1986.

The complaint before me seeks an order directing the
 defendants to admit plaintiff to the Medical Staff of United
 Hospital, an injunction restraining the defendants from refusing
 to grant him privileges at the Hospital as well as from taking
 any action to prevent him from being granted professional privi-
 leges at other hospitals and money damages.

II.

Defendants have moved to dismiss the complaint on the
 grounds that it fails to state a cause of action and that there
 is no subject matter jurisdiction.^{12/} Before proceeding to an
 examination of the merits of these contentions there is a pro-
 cedural question which must be disposed of.

Defendants have supported their motions to dismiss by
 affidavits and therefore purport to come within the last sentence
 of Rule 12(b) which provides that where "matters outside the
 pleading" are considered by the court, such motions shall be
 treated as motions for summary judgment.^{13/} Plaintiff argues that

these affidavits are "argumentative" and suggests that they be treated as memoranda rather than as having presented "matters outside the pleading." This I decline to do. While it is true that Rule 12(b) allows the court the option of disregarding the extrinsic material and deciding the motion on the pleadings, where, as here, factual matters are presented in the affidavits which are relied on by the court, the better practice is to treat the motion as one for summary judgment. Thompson v. New York Central Railroad Company, 361 F.2d 137 (2d Cir. 1966). Accordingly the motion before me will be disposed of as provided in Rule 56.

III.

This brings me to the core of the case before the court: the presence or absence of "state action" or "action taken under color of state law". Although the various constitutional and statutory claims presented by plaintiff require somewhat different treatment, the majority of them are completely dependent upon a finding of the requisite state involvement. The only major exceptions to this are the claims under 42 U.S.C. § 1985 and § 1986 with which I shall deal later.

Defendants contend that what is involved here is purely private action by a private hospital:

"The United Hospital is a private, self-governing nonprofit organization. It is governed by a Board of Trustees which is composed of various doctors on the staff.... Neither the state nor the Federal Government is involved in the governing of the internal affairs of the Hospital or in the decisions relating to appointments to the Medical Staff."

Needless to say, the plaintiff disagrees. He asserts several factors which, it is argued, conclusively establishes that the actions of the Hospital and its staff constitute "state
18/
action":

1. The Hospital is performing a public function. The State of New York has merely delegated the Hospital to perform its constitutional duty to provide health care services for its citizens.
2. The Hospital has received extensive "Hill-Burton Hospital Construction Program" funds from the federal government.
3. The Hospital has been granted tax exemptions by both
19/
the state and federal government.
4. New York has adopted a pervasive scheme of statutes and codes which regulate almost every facet of hospital activity.
5. The Hospital is the only general hospital serving the communities of Port Chester, Mamaroneck and Rye. A new hospital, whether public or private, cannot be built within the area presently served by United without the prior approval of
20/
the Commissioner of Health of the State of New York.

Plaintiff's arguments are well researched and extremely well presented. Had the matter arisen in any of several other circuits across the country they might very well have proved dispositive of the issue and mandated a resolution in plaintiff's
21/
favor. This case, however, arises in the Second Circuit and an

examination of the prevailing view of "state action" held by our Court of Appeals leads me to the conclusion that plaintiff has not made a sufficient showing of state involvement. Quite aside from the constraints of stare decisis that require me to follow the Second Circuit, it is my belief that its decisions more nearly accord with the Supreme Court's opinion in Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972), than those of the circuits which arrive at contrary conclusions.

IV.

There is little question here that United Hospital is formally a "private" institution. Although established by permission of the legislature, it was organized by private individuals and incorporated as a non-profit organization. The individuals who operate the Hospital and are responsible for its management are neither government officials nor government appointees. Instead, the corporate affairs and funds of the Hospital are controlled and administered by a Board of Trustees composed of staff doctors and prominent members of the local community.

Neither § 1983 nor the Fourteenth Amendment erect a shield against merely private conduct, however discriminatory or wrongful. Shelley v. Kraemer, 334 U.S. 1, 13 (1948). Conduct that is formally private may, however, "become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the ... limitations placed upon state action." Evans v. Newton, 382 U.S. 296, 299 (1966).

"While the principle is easily stated, the question of whether particular discriminatory conduct is 'private', or the one hand, or amounts to 'state action' on the other hand, frequently admits of no easy answer." Moose Lodge No. 107 v. Irvis, supra at 172. It is "only by sifting facts and weighing circumstances [that] the nonobvious involvement of the State in private conduct can be attributed its true significance." Burton v. Wilmington Parking Authority, 365 U.S. 715, 722 (1961).

An examination of the cases decided by our Court of Appeals reveals what appears to me to be a three pronged test for determining the existence of "state action". Thus, in order to subject 'private' institutions to the limitations of § 1983 and the constitutional amendments it must be shown (1) that the state's involvement with the private institution is "significant,"²³ (2) "that the state must be involved not simply with some activity of the institution ... but with the activity that caused the^{24/} injury" (hereinafter referred to as the "nexus" requirement) and (3) that the state's involvement must aid, encourage or connote^{25/} approval of the complained of activity.

Before expounding upon the application of the formula to the instant case, it is vital to point out the two situations which represent significant departures from this standard.

The first of these occurs in the area of racial discrimination.^{26/} Our circuit has long recognized a double "state action" standard: "a less onerous test for cases involving racial discrimination, and a more rigorous standard for other claims".

Jackson v. The Statler Foundation, _____ F.2d _____ (2d Cir. 1974); Lefcourt v. Legal Aid Society, 445 F.2d 1150 (2d Cir. 1971); Wolin v. Port Authority, 392 F.2d 83 (2d Cir. 1968), cert. denied, 393 U.S. 940 (1969). As the court stated in Jackson, *supra*, "conduct which is admittedly part private and part governmental must be more strictly scrutinized when claims of racial discrimination are made." Plaintiff makes no claim of racial discrimination here and therefore does not permit me to abandon the three pronged test in favor of the standard of "strict judicial scrutiny." It is noteworthy that an examination of the cases finding state action in the denial or removal of staff privileges by private hospitals reveals that a large number of them concerned claims of racial discrimination. See Sinkins v. Moses H. Cohen Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 938 (1964); Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964); Smith v. Hampton Training School, 360 F.2d 577 (4th Cir. 1966).

The second departure from a strict adherence to the three pronged test would appear to exist in the "public function" cases. These involve activities which have long been the exclusive province of state or municipal government. "When a private person is performing, pursuant to a right accorded by statute, a function traditionally performed by the state, the acts of the individual [or institution] may be described as state action." Bond v. Dentzer, _____ F.2d _____ (2d Cir. 1974) [slip opinions at 2108]; Sinkins v. Moses H. Cohen Memorial Hospital, *supra*.

Plaintiff contends that such a "public function" is

present here. The New York State Constitution, he asserts, places responsibility for public health squarely in the hands of the state.^{27/} Proceeding from this foundation the argument is then made that "New York has elected to effect this policy by means of a coordinated plan of building and maintaining public hospitals for certain functions and areas, and by certifying and regulating private hospitals as part of the carrying out of this policy."^{28/}

The "public function" approach has met with some success in the Supreme Court. See Marsh v. Alabama, 326 U.S. 501 (1946) [the company town]; Terry v. Adams, 345 U.S. 461 (1953) [party primaries]; Evans v. Newton, 382 U.S. 296 (1966) [public parks]; and Amalgamated Food Employees Union Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968) [public walkways and parking areas of a privately owned shopping center]. I do not find the reasoning of these cases to be applicable to the private hospital.

Initially, it appears to me that the decisions of our Court of Appeals in Powe v. Miles, 407 F.2d 73 (2d Cir. 1968) and Grafton v. Brooklyn Law School, 478 F.2d 1137 (2d Cir. 1974),^{29/} are closely analogous to the case at bar.

In Powe v. Miles, supra, the appellants sought to apply the "public function" argument to a private university. Judge Friendly, writing for the court, rejected this contention. "Education," he said, "has never been a state monopoly in this country, even at the primary or secondary levels..."^{30/} The Supreme Court "public function" cases concerning "activities or facilities

so clearly governmental in nature" were therefore found not applicable to the university.

In Crafton v. Brooklyn Law School, supra, Judge Friendly extended his conclusion in Powe to private law schools:

"We there [in Powe] rejected the claim that the furnishing of higher education necessarily constitutes state action because it is a 'public function' We see nothing ... here to call for a different result The circumstance that we are here dealing with a law school rather than a liberal arts college does not make law teaching 'governmental in nature.'" 31/

It is my conclusion that private hospitals are likewise not "governmental in nature". Unlike fire departments and police departments mentioned by Justice Douglas in Evans v. Newton, supra at 302, hospitals are not traditionally governmental. Private hospitals are the rule rather than the exception. It is only relatively recently that federal, state and local governments have recognized the need for widespread public health care. Traditionally, however, the provision of medical services has been a matter largely in the private domain. Unlike the holding of elections in Terry the private hospital does not carry on a "traditionally" governmental function. Unlike the municipal park in Evans, the private hospital does not purport to serve the community as a whole. Finally, unlike the sidewalks in Marsh, and Logan Valley, the private hospital does not hold itself out as a public area "open to all comers". 32/

Plaintiff counters this by stressing that United Hospital is the only general hospital serving the area. As such, he argues

it operates in a quasi-public capacity, being required to provide emergency care for unidentified persons brought to it, and to accept for treatment all individuals who require immediate hospitalization without regard to ability to pay. Even assuming this to be so, I cannot conclude that it makes the "public function" theory applicable to the case at bar. That doctrine has heretofore been limited in its application to situations where the constitutional violation alleged occurred in the very activity in which the private institution performed its "traditionally governmental function". This is not the case here. Even if it may be successfully argued that a private hospital is performing a public function it is clear that the function involved is the admission and treatment of patients, not the hiring and firing of doctors, nurses and other staff personnel. I find no compelling authority for extending the "public function" argument to a private hospital in the absence of a nexus between the governmental function performed and the violative activity alleged.

In summary, I have concluded that the two major areas in which the three pronged test has not been utilized by our circuit are racial discrimination and traditionally governmental activities. Neither is present in the case before me. The notion that the "state action" cases will be given diverse treatment depending on the nature of the activity involved and the constitutional infirmity alleged is not a new one. It was Judge Friendly who first utilized the example of a private hospital to illustrate the need for a flexible standard in testing for state action:

"The strongest case for outlawing discrimination in admissions is the hospital. Because of the importance of the geographical factor and the literally vital interests often at stake, it may well be held that for the state to allow one Negro to die because a 'private' hospital will not admit him is to allow one more than the Fourteenth Amendment permits.... To hold that a state cannot constitutionally allow any hospital to refuse to admit a Negro patient does not compel a similar universal as to fair policies for recruiting staff and other employees, and still less as to procedural due process for their dismissal."38/

V.

Having determined the applicability of the three pronged test it remains to examine whether plaintiff's complaint has satisfied its requirements.

The two major factors relied on to endow the actions of United Hospital with the requisite "state action" are: (1) governmental financial aid, and (2) a "pervasive" scheme of laws and regulations governing the activities of all hospitals in the state. I deal with these seriatim keeping in mind, nevertheless, that it is the "totality of the circumstances" which must be considered in testing for the presence of "state action". Burton v. Wilmington Parking Authority, supra.

United Hospital is alleged by plaintiff to be the recipient of "substantial" federal aid in the form of Hill-Burton Hospital Construction Program funds. 39/ Additionally, the Hospital is the beneficiary of a host of tax exemptions and participates in Medicare and Medicaid programs. Plaintiff contends that "state action" is therefore present here. Numerous cases are cited by him in support of this proposition. None however were decided in this circuit.

The issue of whether federal funding of private hospitals, primarily via the Hill-Burton Act, is sufficient to bring an otherwise private hospital within the scope of § 1983 and the Fourteenth Amendment is one that has split the circuits. The ^{40/}Fourth, and arguably the ^{41/}First and ^{42/}Third Circuits as well, would find "state action" in the instant case. ^{43/}The ^{44/}Sixth, ^{45/}Seventh, ^{46/}Eighth and Tenth Circuits most likely would not.

Although our Court of Appeals has never considered the effect of Hill-Burton funding on the actions of an otherwise private institution, it has considered the effect of other governmental funding. These decisions clearly indicate what I have defined as a three pronged test. Thus the funding (1) must be significant; (2) must have a nexus with the complained of conduct; and, (3) must further the unconstitutional activity.

There is no contention by defendant here that the Hill-Burton funding of United Hospital is insignificant. The primary pitfall for plaintiff comes, however, in meeting requirement two, the "nexus" requirement.

Powe v. Miles, supra, made clear "that the state must be involved not simply with some activity of the institution alleged to have inflicted injury upon a plaintiff but with the very activity ^{47/}that caused the injury." In the case at bar the financial aid is directed toward promoting construction of new hospital wings and has no nexus with the employment and termination policies applied with regard to staff. As such, I conclude that there is no "state action" by the mere receipt of Hill-Burton funds. There

exist four decisions in this circuit which convince me of the correctness of this decision.

In Grafton v. Brooklyn Law School, supra, our Court of Appeals rejected the plaintiff's contention, that the conduct of the law school officials constituted state action because of a combination of the school's tax exemption, the sale of a site by New York City at a price so low that the school ultimately paid nothing for the land on which it was built, and a \$400 payment by the state for each degree awarded. The implication is clear; the financial aid had no relation to plaintiffs' complaints regarding their dismissals from Brooklyn Law School. 48/

In Grossner v. Trustees of Columbia University, 287 F.Supp. 535 (S.D.N.Y. 1968), Judge Frankel refused to find state action, in the context of student discipline despite Columbia's receipt of substantial federal government funding combined with federal, state and local tax exemptions. "Receipt of money from the state", said Judge Frankel, "is not, without a good deal more, enough to make the recipient an agency or instrumentality of the Government." He then pointed out the absence of any allegation by plaintiff that the government was involved as a participant in the University disciplinary proceeding complained of. We thus arrive again at the same conclusion; the critical involvement was not in the particular discriminatory action under constitutional attack.

The third significant opinion in my analysis is that of Judge Friendly in Wabba v. New York University, 492 F.2d 96 (2d Cir. 1974). What is of interest here is not so much the holding

of the court but rather its consideration of Simkins v. Moses H. Cohen Memorial Hospital, supra. Simkins, it will be recalled, is the landmark case in finding "state action" by virtue of the receipt of Hill-Burton funds. The court in Simkins had before it a statute permitting the construction of "separate but equal" facilities with Hill-Burton funds. Pursuant to this statutory authority the State of North Carolina distributed these funds to a private, racially segregated hospital. An action was subsequently commenced by several black physicians and patients who charged that the defendant hospital had engaged in discriminatory conduct in violation of the Fourteenth Amendment. The Fourth Circuit concluded that the state's promotion of the hospital's segregationist policy amounted to "state action". Here there was obviously a nexus between the questioned activity and the governmental funding. Judge Friendly in Wahba apparently finds this factor to be a requisite for invoking the Simkins holding. 51/

The last of the four decisions, Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F.Supp. 1020 (S.D.N.Y. 1971), is almost identical factually to the matter before me. It involved an action by two physicians against a private hospital alleging lack of due process and equal protection in the hospital's decision not to reappoint the plaintiffs to its staff. Plaintiffs in asserting the requisite state involvement relied heavily on the receipt by defendant of Hill-Burton construction funds. Citing Powe v. Miles, supra, for the proposition that "the state action, not the private action, must be the subject of the complaint", Judge Metzner concluded in language equally applicable

to the case at bar:

"The plaintiffs in the present case fail to grasp this crucial distinction. In the cases they cite, the critical state involvement was in the very prohibited action under constitutional attack.... There is nothing in the language or logic of these cases to support the proposition that state action would have been present had the private hospital in question discharged an employee without notice or a hearing. This is the conduct which is challenged in the present case and the state is in no way involved in it."^{52/}

Having concluded that the governmental funding received by United Hospital fails to satisfy the "nexus" requirement of the three pronged "state action" test, I proceed to plaintiff's second major contention, namely, that the extent and intrusiveness of the governmental regulatory scheme governing hospitals sufficiently implicates the state in any activities carried on by such institutions. A number of courts have accepted this principle, most notably those of the Fourth Circuit. Eaton v. Grubbs, 329 F.2d 710 (4th Cir. 1964).^{53/}

Although I am perfectly willing to concede that the pervasive regulatory scheme here is a "significant" state involvement, fulfilling the first requirement of the three pronged test, it is questionable whether it satisfies the "nexus" requirement, and it clearly fails to "aid, encourage or connote approval of the complained of activity," as required by the third prong.

Judge Metzner, in Mulvihill, in addition to dealing with the Hill-Burton issue, also was confronted with the contention that the subjecting of private hospitals to detailed regulation by the State of New York amounted to "state action". Judge Metzner

rejected this argument noting that, although New York plays a substantial role in supervising the operation of private hospitals within its borders;^{54/} "the State as part of its general regulatory scheme, does not in any way associate itself with or influence the internal decisions of a hospital's board of trustees to hire or fire staff members."^{55/} The mere fact that New York regulates the facilities and standards of care of private hospitals does not per se make the acts of the hospital in discharging physicians the acts of the state. "Such a blanket rule," said Mulvihill, "would overlook 'the essential point — that.... the state action, not the private action, must be the subject of complaint.'"^{56/}

Mulvihill thus concluded that the "nexus" requirement had not been satisfied.^{57/} It was not contended there that the state in any way associated itself with the hospital's methods of hiring and firing physicians. No governmental approval of the hospital's internal by-laws was required and no state nominees sat on its board of trustees. From this, Judge Metzner found that "the State has never shown an interest in supervising or influencing the purely internal affairs of these hospitals."^{58/}

Plaintiff in the case at bar contends that post-Mulvihill statutory additions to the Public Health Law which seek to prohibit improper practices in hospital staff appointments provide the requisite "nexus" with the challenged activity and therefore deprive that decision of its vitality. There is a great deal of merit to this assertion.

The procedures presently in effect in many hospitals

governing staff privileges are capricious and arbitrary. There are certain medical specialities in which it is extremely difficult to obtain staff privileges. In New York City it is estimated that thirty percent of all physicians are without privileges in any hospital. The decisions denying staff privileges in many instances do not disclose the reasons for the denial and are often arrived at because of a purely local situation and without regard to the physician's professional competence.
59/

In order to alleviate this condition the State Legislature, on May 15, 1972 enacted Section 2801-b of the Public Health Law.
60/

Subsection (1) of this statute provides that it shall be an improper practice to deny staff privileges to a physician (a) without stating the reasons therefor or (b) for reasons unrelated to standards of patient care, the objectives of the institution or the character or competency of the applicant.

Subsection (2) provides that any person claiming to be aggrieved by an improper practice defined in Subsection (1) may file a verified complaint with the public health council.

Subsection (3) provides that upon receipt of such a complaint the council shall make a prompt investigation. If the council determines after such an investigation that cause exists for crediting the allegations of the complaint, it shall direct the governing board of the hospital to review its actions.

By enacting this provision, plaintiff asserts, New York has expressed its public policy that staff appointments are

of concern to the State. Thus, he contends, it has involved itself directly in the very activity out of which the challenge^{61/} in the complaint arises.

It is clear that the procedures outlined in § 2801-b are not applicable to plaintiff's case. Indeed, when his complaint was referred to the New York State Department of Health for official review, the Public Health Council declined to consider the matter on the ground that the action of the Hospital occurred prior to the effective date of the law.^{62/} There would seem, therefore, to be some question as to the appropriateness of considering the effect of a statute on the existence of "state involvement" when the activity complained of preceded its enactment. In any case I find no compelling reason to confront this issue in view of my conclusion that, even when considered, these legislative enactments do not satisfy the third requirement of the Second Circuit "state action" cases.

The Second Circuit has recently stressed the "essential distinction between a regulatory scheme in which a private institution plays a part in an offensive government policy and one which is designed to prevent the institution's acting in an abusive way."^{63/} In Shirley v. State National Bank of Connecticut, _____ F. _____ (2d Cir. 1974), plaintiff contended that a Connecticut statute providing for the necessity of legal process in repossessions sufficiently implicated the state in the seizure of an automobile by defendant bank to constitute "state action". Judge Mulligan, writing for the court disagreed, pointing out that the

statute, rather than authorizing the seizure, had actually made it more difficult. "Thus," he concluded, "the State does not encourage seizure, nor does it in any way aid or abet the seller the state enactment was amelioratory not regressive; it did not move in on the plaintiff or other buyers, but rather on the installment sellers." ^{64/} Shirley, then, clearly stands for the proposition that the mere fact that the state has legislated in the area of the conduct complained of does not in and of itself constitute sufficient participation to be appropriately denominated "state action".

In Bond v. Dentzer, _____ F.2d _____ (2d Cir. 1974), the court reaffirmed its holding in Shirley. That case involved a wage assignment invoked by defendants, finance and loan companies, as a result of plaintiffs' alleged default on a loan. Plaintiffs argued that state statutes providing for execution against wages by service of a wage assignment upon an employer was sufficient to constitute state involvement. Judge Mulligan rejected this contention, concluding that the statutes were conspicuously and designedly for the benefit of the borrower and not the lender:

"The State in this case has not deprived the plaintiffs of anything....

"It is abundantly clear that ... [the statute's] provisions were designed, not to encourage the assignment of wages, but to discourage the over-reaching of the wage earner." ^{65/}

The most recent state action case in this circuit, Jackson v. The Statler Foundation, _____ F.2d _____ (2d Cir. 1974), set out five factors it considered "particularly important to a

determination of state action." One of these was whether the governmental regulatory scheme "connotes government approval of the activity."^{66/} Although the court in Jackson indicated that not each and every one of the five factors need be present to permit a finding of "state action", it limited its conclusions to cases involving racial discrimination. As noted before, "racial discrimination is so peculiarly offensive and was so much the prime target of the Fourteenth Amendment that a lesser degree of involvement may constitute 'state action' with respect to it than would be required in other contexts." Coleman v. Wagner College, 429 F.2d 1120, 1127 (2d Cir. 1970) (concurring opinion of Judge Friend

While it may be true, as plaintiff points out, that analyzing state action in this fragmented manner differs from the majority of holdings in other circuits, it appears to me to be completely in accord with the Supreme Court opinion in Moose Lodge No. 107 v. Irvis, supra. That already widely cited case involved a guest of a member of a private club who was refused service because of his race. He sued, contending that the grant of a liquor license to the lodge by the Pennsylvania Liquor Authority subjected it to a pervasive regulatory scheme which implicated the state in the actions of the lodge. The Court held this insufficient to constitute "state action", concluding that however detailed the regulatory scheme, it cannot be said in any way to foster, approve or encourage the lodge's racially discriminatory practices.

The cases discussed above mandate a conclusion that the regulatory scheme here does not constitute state action even when

considered in conjunction with the governmental funding. The decision to deny plaintiff staff privileges was entirely that of the hospital; it was authorized by the hospital's by-laws, and the state in no way fostered, approved or encouraged defendants' conduct. The effect of § 2801-b, if any, is merely amelioratory.

"Private action does not become state action simply because government regulation has not gone so far as a plaintiff would like."

Jackson v. The Statler Foundation, supra, (slip opinions at 2770, dissenting opinion of Judge Friendly).

VI.

One question remains to be resolved. Plaintiff's complaint alleges violations of 42 U.S.C. § 1985^{69/} and § 1986^{70/}. Neither of these sections mentions that the violative conduct must be taken "under color of state law." Nevertheless, in Collins v. Hardyman, 341 U.S. 651 (1951), the Supreme Court held that state action was indeed a necessary ingredient to a cause of action under these statutes. Twenty years later in Griffin v. Breckenridge, 403 U.S. 88 (1971), the Court reconsidered the question and arrived at the opposite conclusion. Section 1985(3), concluded Justice Stewart, was clearly intended to cover private conspiracies. A limitation was placed on this holding however, which is crucial to the case at bar:

"That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others.... The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the Congressional

purpose — by requiring as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors.... "71/

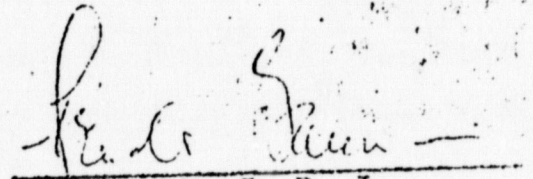
Thus before a cause of action exists under 1985 or 1986 there must be some "racial, or perhaps otherwise class-based invidiously discriminatory animus behind the conspirator's action." Plaintiff has made no such allegation of class-based discrimination. He has, therefore, failed to satisfy the requirements of the statutes. Jackson v. Norton-Children's Hospital, 487 F.2d 502, 503 (6th Cir. 1963), cert. denied, _____ U.S. _____ (1974).

Conclusion

For all of the preceding reasons the defendants' motion for summary judgment dismissing plaintiff's complaint is granted.

SO ORDERED.

Dated: May 23, 1974


U. S. D. J.

Footnotes

- 1/
42 U.S.C. Sections 1983, 1985 and 1986. The jurisdiction of the court is asserted under 28 U.S.C. Sections 1331, 1343 and 1361.
- 2/
Gardner v. Toilet Goods Ass'n, 387 U.S. 167 (1967); Murray v. City of Milford, 380 F.2d 469 (2d Cir. 1967).
- 3/
Section 125.40 et seq. of the Penal Law in effect in New York at that time.
- 4/
In September of 1963, the Board of Trustees of United Hospital voted not to reappoint plaintiff to his position on the Medical Staff.
- 5/
Plaintiff's present counsel, Mr. Gutman, was present at the hearing.
- 6/
The defendants, in addition to the Hospital, are the members of its "Credentials Committee," "Medical Council," "Joint Conference Committee," and Board of Trustees as well as various other staff physicians and surgeons.
- 7/
First and Fourteenth Amendments of the U.S. Constitution.
- 8/
Ninth and Fourteenth Amendments of the U.S. Constitution.
- 9/
Fifth and Fourteenth Amendments of the U.S. Constitution.
- 10/
Fourteenth Amendment of the U.S. Constitution.
- 11/
Eighth and Fourteenth Amendments of the U.S. Constitution.
- 12/
In view of my disposition of the case I need not reach defendants allegation that the various specific causes of action are barred by the statute of limitations.
- 13/
The last sentence of Rule 12(b) provides:

"If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a

claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."

14/

All the parties involved in this case were duly informed of the court's decision to treat the motion as one for summary judgment and were given a reasonable opportunity, namely ten days, to present all material facts made pertinent to such motion by Rule 56. The decision to treat defendants' motion under Rule 56 makes it unnecessary to determine whether 12(b)(1) or 12(b)(6) is the proper subsection to allege the lack of "state action" which is the core of defendants' claims. I note, however, that there is a lack of agreement among several federal courts as to which is the appropriate subsection to be invoked in such a situation. Meredith v. Allen County War Memorial Hospital Com., 397 F.2d 33, 35 (6th Cir. 1968); Adams v. So. Calif. First Nat'l Bank, 492 F.2d 324, 338 (9th Cir. 1973).

15/

42 U.S.C. § 1983 authorizes a civil action for deprivation of civil rights only when the alleged deprivation is caused by a person acting under color of state law:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress." [Emphasis added].

Similarly, plaintiff's claims under the First, Fifth and Eighth Amendments [and possibly the Ninth Amendment as well], having no applicability in and of themselves to actions of the sovereign states, only come into play here by virtue of the Fourteenth Amendment which requires a showing of state action:

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." [Emphasis added].

The "under color of law" requirement of § 1983 has traditionally been treated as the equivalent of the "state action" requirement of

the Fourteenth Amendment. Adams v. So. Calif. First Nat'l Bank, 492 F.2d 324, 329 (9th Cir. 1973).

16/

Neither § 1985 nor § 1986 explicitly requires a showing of state involvement and the recent Supreme Court opinion in Griffin v. Breckenridge, 403 U.S. 88 (1971), holds that, in some situations, no such showing need be made.

17/

Page 6 of the brief submitted by Clark, Gagliardi & Miller.

18/

It is difficult to ascertain from plaintiff's complaint whether he is merely challenging the actions of New York State or whether he asserts the involvement of the federal government as well. Although it might therefore be more accurate to refer to the challenged activity as "governmental action," the courts have traditionally utilized the term "state action" to encompass both federal and state involvement and there is no pressing reason to depart from this practice. Jackson v. The Statler Foundation, _____ F.2d _____ (2d Cir. 1974) (slip opinions at 2746).

19/

Although this factor is not explicitly argued in plaintiff's brief, many of the cases cited therein based their findings of state action on such exemptions.

20/

New York Public Health Law § 2802.

21/

The decisions of these circuits are dealt with in some depth later in the opinion.

22/

Affidavit of Charles J. Alexander, M. D.

23/

Reitman v. Mulkey, 397 U.S. 369, 380 (1967); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

24/

Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Powe v. Miles, 407 F.2d 73 (2d Cir. 1968).

25/

Moose Lodge No. 107 v. Irvis, supra; Bond v. Dentzer, _____ F.2d _____ (2d Cir. 1974); Shirley v. State National Bank of Conn., _____ F.2d _____ (2d Cir. 1974).

26/

The rationale behind this exception may make it equally applicable to cases involving sex or age discrimination. That being no part

of the claim before me however, there is no need to address this question here.

27/

Article 17 § 3:

28/

Page 5 of plaintiff's brief. This argument has been adopted by the Fourth Circuit in Sirkins v. Moses H. Cohen Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), cert. denied, 375 U.S. 933 (1964), and by the Sixth Circuit in Meredith v. Allen County War Memorial Hospital Commission, 397 F.2d 33 (6th Cir. 1968). Both of these cases, however, involved a Board of Trustees consisting of a substantial number of members appointed by state agencies. Further, the continued vitality of the Meredith case is placed very much in doubt by the recent decision of Jackson v. Horton-Children's Hospital, 487 F.2d 502 (6th Cir. 1973), cert. denied, _____ U.S. _____ (1974).

29/

No Second Circuit case has come to my attention dealing with applicability of the "public function" argument to private hospital. For this reason I have resorted to analogy. Although McCabe v. Nassau County Medical Center, 453 F.2d 698 (2d Cir. 1971), indicated at 703, fn 11, that the plaintiff there sought to apply the "public function" theory to hospitals, the court did not feel the need to address itself to the question since the case at bar involved a public hospital.

30/

407 F.2d at 80.

31/

478 F.2d at 1140.

32/

Powe v. Miles, 407 F.2d at 80.

33/

Public Health Law § 2806.

34/

Public Health Law § 2805-a.

35/

Evans dealt with the "use" of a municipal park, Marsh and Logan Valley with the "use" of sidewalks and Terry with the exercise of the right to vote. In all four the activity in which the complaint of conduct took place was the very one which had been judicially determined as being "governmental in nature."

36/

This, perhaps, would not be so where the hiring and firing of staff members is done by a commission, the members of which hold

office as a result of governmental appointments. See Meredith v. Allen County War Memorial Hospital Com'n, 397 F.2d 33, 35 (6th Cir. 1968). No such situation exists in the instant case and it is therefore unnecessary to reach this issue.

37/

It is doubtful that the Supreme Court would have applied the "public function" theory to the park in Evans had the complaint concerned the discharge of groundskeepers without a full meeting complete with all the protections of due process.

38/

Friendly, The Dartmouth College Case and the Public-Private Penumbra, 12 Texas L.Q. (2d Supp.) 141. Judge Friendly recently reiterated this view in Wabba v. New York University, 492 F.2d 96, 100 (2d Cir. 1974), concluding that "decisions dealing with one form of state involvement and a particular provision of the Bill of Rights [are not] at all determinative in passing upon claims concerning different forms of government involvement and other constitutional guarantees...."

39/

The Hill-Burton Act, 42 U.S.C. § 291 et seq. provides federal grants to assist in the maintenance and construction of hospitals. "The money is funneled through ... state agencies to individual hospitals which are engaged in building projects." Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F.Supp. 1020, 1023 (S.D.N.Y. 1971). [Emphasis added].

40/

See Sams v. Ohio Valley General Hospital, 412 F.2d 826 (4th Cir. 1969); Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966); Eaton v. Cumbs, 329 F.2d 710 (4th Cir. 1964); Simkins v. Moses H. Cohen Memorial Hospital, 323 F.2d 959 (4th Cir. 1963), cert. denied, 376 U.S. 933 (1964). All of these cases, with the exception of Sams, involved racial discrimination however. Sams concerned denial of equal protection to non-residents seeking staff privileges. Although all of the four cases are easily distinguishable on their facts it is fairly obvious that the Fourth Circuit would rule no differently faced with the facts of the instant case.

41/

See Bricker v. Scava Spence Memorial Hospital, 339 F.Supp. 234, 237 (D.N.H. 1972), where the court said: "I recognize that the weight of authority holds that the acceptance of Hill-Burton funds is sufficient to cloak a private hospital and its medical staff with a mantle of state law." Bricker was affirmed by the Court of Appeals for the First Circuit, 468 F.2d 1228 (1st Cir. 1972). The court there did not, however, review the "state action" determination of the trial judge.

42/

See Citta v. Delaware Valley Hospital, 313 F.Supp. 301 (E.D.Pa.

1970). Cf. Galu v. Lock Haven Hospital, 360 F.Supp. 285 (N.D.Pa. 1974).

43/

The recent case of Jackson v. Norton-Childrens Hospital, 487 F.2d 502 (6th Cir. 1973), cert. denied, ___ U.S. ___ (1974), would appear to overrule O'Brien v. Grayson County War Memorial Hospital, 472 F.2d 1140 (6th Cir. 1973). See also Piace v. Shepherd, 446 F.2d 1239 (6th Cir. 1971) and Meredith v. Allen County War Memorial Hospital, 397 F.2d 33 (6th Cir. 1968).

44/

See Doe v. Bellin Memorial Hospital, 479 F.2d 756 (7th Cir. 1973), apparently overruling Holmes v. Silver Cross Hospital, 340 F.Supp. 125 (N.D.Ill. 1972).

45/

See Stanturf v. Sipes, 335 F.2d 224 (8th Cir. 1964).

46/

See Ward v. St. Anthony Hospital, 476 F.2d 671 (10th Cir. 1973). Cf. Don v. Okmulgee Memorial Hospital, 443 F.2d 234 (10th Cir. 1971).

47/

407 F.2d at 81.

48/

Grafton involved no racial discrimination. It can, therefore, be squared with the decisions in Dutton v. Wilmington Parking Authority, 365 U.S. 715 (1961) and Jackson v. Statler, ___ F.2d ___ (2d Cir. 1974), both finding public financial assistance to comprise "state action". Both, however, involved racial discrimination and consequently applied a less rigid standard.

49/

287 F.Supp. at 547-548.

50/

Simkins, as has been previously stated, involved racial discrimination.

51/

492 F.2d at 101.

52/

329 F.Supp. at 1024 [Emphasis added]. Although the Mulvihill opinion has been undermined somewhat by the passage of Public Health Law § 2801-b, discussed later in the opinion, its conclusions regarding the effect of Hill-Purton funding on the "state action" question remains just as well reasoned and convincing as it was in 1971.

53/

See also Meredith v. Allen County War Memorial Hospital, 397 F.2d 33 (6th Cir. 1968); Bolton v. Silver Cross Hospital, 340 F.Supp. 125 (N.D.Ill. 1972) [7th Circuit]; Taylor v. St. Vincent Hospital, Civ. No. 1090 (D.Mont. 1972) [9th Circuit].

54/

"State approval is required for incorporation or construction of a hospital. There are limitations on ownership and on solicitation of funds for hospitals. A hospital is required to admit all patients needing immediate care regardless of ability to pay. The state has the right to inspect hospitals, to establish rate schedules and operating standards, and dictate accounting systems. A hospital may operate only after it has been certified by the state and is required to submit periodic reports to state officials." Mulvihill v. Julia L. Butterfield Memorial Hospital, 329 F.Supp. 1020, 1023 (S.D.N.Y. 1971).

55/

Id. at 1023.

56/

Id. at 1023.

57/

Although our circuit held in McCabe v. Nassau County, 453 F.2d 698, 703 (2d Cir. 1971), that no such nexus need be shown when dealing with hospitals, it explicitly limited its holding to public hospitals and expressed no opinion as to what it might hold with respect to private hospitals. Judge Moore, dissenting, felt that the Powe v. Miles "nexus" requirement applied as well to Nassau County Medical Center. "The mere fact," he said, "that the hospital is available to members of the public is not determinative or even relevant to the issue here." 453 F.2d at 707.

58/

329 F.Supp. at 1024.

59/

The information contained in this paragraph is derived from the public hearings before the State Senate Health Committee on S.3092-7. These hearings are summarized in the memoranda of Senator Lombardi, Chairman of that Committee, contained in the New York State Legislative Annual 1972, pp. 195-6.

60/

See Chapter 284 of the Laws of New York 1972 entitled "An Act to amend the public health law, in relation to improper practices in hospital staff appointments and privileges."

61/

There exist, in addition to § 2801-b, several other statutes and regulations which govern the appointment and dismissal of staff

by hospitals. Public Health Law § 2806-a prohibits discrimination in hospital staff privileges because of a physician's participation in any medical group practice or non-profit health insurance plan. Public Health Law § 2803 gives the Commissioner the power to inquire into the adequacy of personnel employed at any hospital. See also Part 720 and 721 of the State Hospital Code established pursuant to the authority of § 2803.

62/

This was conveyed to plaintiff's attorney in a letter from Donald MacHarg, Counsel for the Department of Health, which reads in pertinent part:

"... the date of the hospital's ... denial of his application for privileges was May 3, 1972. Public Health Law § 2801-b ... became effective May 15, 1972...."

"Since the action of the hospital complained of occurred prior to the effective date of the law defining a prohibited practice, we regret to advise you that the Public Health Counsel lacks authority to make the investigation requested...."

63/

Judge Friendly dissenting in Jackson v. The Statler Foundation,
____ F.2d ____ 1974) (slip opinions at 2770).

64/

____ F.2d at ____ (slip opinions at 1779) [Emphasis added].

65/

____ F.2d at ____ (slip opinions at 2100, 2103).

66/

____ F.2d at ____ (slip opinions at 2750).

67/

407 U.S. at 176.

68/

I, of course, make no decision as to force of a statute, for purposes of determining "state action", that was enacted after the complained of activity had already occurred.

69/

§ 1985 concerns itself with "conspiracy to interfere with civil rights." It is apparent, although not explicitly spelled out in the complaint, that plaintiff is alleging a violation of subsection (3) which deals with conspiracies to deprive persons of "rights or privileges."

70/

§ 1986 concerns itself with actions for "neglect to prevent"

conspiracies mentioned in § 1935. Therefore, if no cause of action is made out under 1935, none exists under 1936 either.

71/
403 U.S. at 102 [Emphasis added].

72/
Id. at 102.